PRACTITIONERS' GUIDE

TO THE

UNITED STATES COURT OF APPEALS

FOR THE

TENTH CIRCUIT

FIFTH REVISION

DECEMBER 1998

Distributed by:

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
BYRON WHITE UNITED STATES COURTHOUSE
1823 STOUT STREET
DENVER, COLORADO 80257

FOREWORD

FOREWORD

This new edition of the "Practitioners' Guide" is intended to assist attorneys in preparing their cases for appellate presentation to the Tenth Circuit. The Guide can be a valuable tool, but it must be used in conjunction with and not in lieu of both the Federal Rules of Appellate Procedure and the local Tenth Circuit rules.

The Overview, which appears at the beginning of the Guide, is intended to give a reader who is not generally familiar with our court a short orientation on the court, its personnel, and operation. The "major case processing events" is an important quick-reference feature intended to give an overview of the various documents that must be filed, by whom, where, and when, identifying the principal controlling rule. The rest of the volume summarizes our rules and procedures, and sometimes gives pointers to aid lawyers in making presentations to the judges.

The practitioner, wondering how to proceed, should always look first to the Federal Rule of Appellate Procedure and then to the Tenth Circuit local rule, if any, which should be numbered similarly. This Practitioners' Guide makes frequent reference to both the Federal Rules of Appellate Procedure and the Tenth Circuit Rules, often paraphrasing those rules. Counsel are reminded, however, that the information contained in this Guide is subordinate to the requirements set forth in the Tenth Circuit Rules of Court and in the Federal Rules of Appellate Procedure. Users are also reminded that all of these rules are subject to periodic changes which may not be reflected in this Guide.

Paul J. Kelly, Jr.
U.S. Circuit Judge
February 1998

JUDGES AND OFFICERS

JUDGES AND OFFICERS

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CIRCUIT JUSTICE:

Stephen G. Breyer	Washington, D.C.

CIRCUIT JUDGES:

Deanell R. Tacha, Chief Judge	Lawrence, Kansas
Stephanie K. Seymour	Tulsa, Oklahoma
David M. Ebel	Denver, Colorado
Paul J. Kelly, Jr.	Santa Fe, New Mexico
Robert H. Henry	Oklahoma City, Oklahoma
Mary Beck Briscoe	Topeka, Kansas
Carlos F. Lucero	Denver, Colorado
Michael R. Murphy	Salt Lake City, Utah
Harris L Hartz	Albuquerque, New Mexico
Terrence L. O'Brien	Cheyenne, Wyoming
Michael W. McConnell	Salt Lake City, Utah
Timothy M. Tymkovich	Denver, Colorado

SENIOR CIRCUIT JUDGES:

William J. Holloway, Jr.	Oklahoma City, Oklahoma
Robert H. McWilliams	Denver, Colorado
James E. Barrett	Cheyenne, Wyoming
Monroe G. McKay	Salt Lake City, Utah
John C. Porfilio	Denver, Colorado
Stephen H. Anderson	Salt Lake City, Utah
Bobby R. Baldock	Roswell, New Mexico
Wade Brorby	Cheyenne, Wyoming

CIRCUIT EXECUTIVE:

David Tighe, Circuit Executive

Deputy Circuit Executive:
Vicky Parks

CLERK:

Patrick Fisher, Clerk

Chief Deputy Clerk:
Doug Cressler

CHIEF STAFF COUNSEL:

Niki Esmay Heller, Chief Staff Counsel

Supervising Staff Counsel:
Sara H. Sanford

LIBRARIAN:

J. Terry Hemming, Circuit Librarian

Deputy Circuit Librarian:
Catherine McGuire Eason

CIRCUIT MEDIATION OFFICE:

David W. Aemmer, Chief Circuit Mediator

Circuit Mediators:
Lance Olwell
Kyle Ann Schultz

TABLE OF CONTENTS

TABLE OF CONTENTS

APPENDICES

Fifteenth Printing – June 2004

OVERVIEW

OVERVIEW

OF

THE UNITED STATES COURT OF APPEALS

FOR THE TENTH JUDICIAL CIRCUIT

Court Structure

The federal courts of appeals are the intermediate appellate courts between the district (trial) courts and the Supreme Court of the United States. There are thirteen courts of appeals: eleven numbered circuits (First through Eleventh), the District of Columbia Circuit, and the Federal Circuit. The numbered circuits, including the Tenth Circuit, provide appellate review of all cases tried in the district courts within the geographic area of their jurisdiction; they also decide appeals brought to them by residents of the circuit from various administrative tribunals, including the Tax Court and agencies of the federal government. The territorial jurisdiction of the Tenth Circuit includes the six states of Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah, plus those portions of the Yellowstone National Park extending into Montana and Idaho.

Other federal courts also have jurisdiction of cases arising in the Tenth Circuit. The District of Columbia Circuit may hear administrative appeals from most federal agencies regardless of the residence of the litigants. The Federal Circuit has exclusive jurisdiction over appeals of patent cases and most nontort claims seeking monetary recovery against the United States government.

A history of the United States Court of Appeals for the Tenth Circuit was published in 1992. Logan, Hon. James K., ed., *The Federal Courts of the Tenth Circuit: A History* (1992).

Only the United States Supreme Court can review decisions of the Tenth Circuit. In almost all instances the Court has the discretion whether to take the case. Indeed, the United States Supreme Court accepts for review less than one percent of the Tenth Circuit's cases. In most litigation the court of appeals is for practical purposes the court of last resort.

The headquarters of the Tenth Circuit is the Byron White United States Courthouse, 1823 Stout Street, Denver, Colorado, named after Supreme Court Justice Byron R. White who served on the Court from 1962 to 1993. Justice White

was a Colorado native and was assigned as our circuit justice during his tenure on the United States Supreme Court. Most oral arguments are heard in Denver, but the court may hear cases at any place within the circuit. The court holds special criminal sessions in the separate states and occasionally will hold a full session in one of the states in the circuit.

Judges

Each of the six states in the circuit has at least one active judge on the court. The court is allocated twelve judges and has eight senior judges. Although all judges on the Tenth Circuit maintain chambers in the Denver courthouse, the non Colorado judges have their principal working chambers in their home states.

The chief judge is the administrative head of the court. A judge becomes chief by being the circuit judge in regular active service who is both senior in commission and under the age of sixty-five when an opening occurs. The chief judge may not serve more than seven years or after reaching age seventy. The chief judge is also a member of the Judicial Conference of the United States and presides over the annual Judicial Conference of the circuit and over the Judicial Council of the circuit.

Circuit judges are appointed by the President and are confirmed by the Senate. The active circuit judges are those who have entered upon the service of their office, and have not yet taken senior status or retirement. A judge becomes eligible for senior status or retirement at age sixty-five if he or she has fifteen years of service, or at a later age when a combination of the judge's age and service on the court (with a ten-year minimum) equals eighty. Senior judges continue as members of the court to the extent that they are willing and the court requests their service. All of the senior judges of this court continue to serve and provide great service to the court. It would not be possible for the court to handle its workload without their contribution.

The current active judges, in order of seniority, are: Chief Judge Deanell Reece Tacha of Kansas; Stephanie K. Seymour of Oklahoma; David M. Ebel of Colorado; Paul J. Kelly, Jr. of New Mexico; Robert H. Henry of Oklahoma; Mary Beck Briscoe of Kansas; Carlos F. Lucero of Colorado, Michael R. Murphy of Utah, Harris L Hartz of New Mexico, Terrence L. O'Brien of Wyoming, and Michael W. McConnell, of Utah. Senior judges are William J. Holloway, Jr., of Oklahoma; Robert H. McWilliams of Colorado; James E. Barrett of Wyoming; and Monroe G. McKay of Utah; John C. Porfilio of Colorado; Stephen H. Anderson of Utah; Bobby R. Baldock of New Mexico; Wade Brorby of Wyoming.

Nonjudge Personnel

Although the chief judge oversees all of the circuit's administration, nonjudge personnel supervise many important activities of the circuit more directly. The Circuit Executive, David Tighe, is in charge of most nonjudicial administrative duties of the courts within the Tenth Circuit. His specific duties include receipt of all complaints against judges in the circuit.

The Clerk of the Court, Patrick Fisher, is custodian of the court's records and papers. With the assistance of the Chief Deputy Clerk, Doug Cressler, and a large staff in the clerk's office, he receives and accounts for monies paid to the court, initiates a docket for each appeal, enters all filings in appeals, issues calendars of cases for court sessions, and enters orders and opinions of the court as authorized and issued by the judges. The clerk has authority to act on certain routine motions. 10th Cir. R. 27.3(A). The clerk's office is located on the first floor of the Byron White United States Courthouse, 1823 Stout Street, Denver, Colorado, and is open for business from 8:00 a.m. to 5:00 p.m., Mountain Time, Monday through Friday, except legal holidays. The court, however, is always open for the purpose of filing any proper paper, of issuing and returning process, and of making motions and orders. Matters that arise outside of regular office hours should be directed to the Clerk, Patrick Fisher, or Chief Deputy Clerk, Doug Cressler, whose **home telephone numbers** are: Patrick Fisher (303) 674-2245 and Doug Cressler (720) 855-3199. If filings are required to be made outside of normal business hours, arrangements should be made in advance if possible to ensure that the clerk or chief deputy will be available.

The office of staff counsel, headed by Niki Esmay Heller, provides major assistance to the judges on selected types of cases, particularly those that do not require oral argument.

The Circuit Librarian, J. Terry Hemming, presides over a large collection of legal materials at the circuit library in Denver. The circuit library is available for use by lawyers admitted to practice before the circuit court, and is located in the Byron Rogers United States Courthouse, 1929 Stout Street, Denver, Colorado.

The circuit mediation office provides mediation services in civil appeals. The Circuit Mediators are David W. Aemmer, Lance Olwell and Kyle Ann Schultz. You may be contacted by one of them to explore the possibility of settlement of your case. Counsel are encouraged to request a conference if the Circuit Mediation Office might assist in settling your case. Requests for a conference are confidential.

The names, office addresses, and phone numbers of the key administrative personnel appear at the end of this section.

Judicial Conference

All members of the bar of the court are entitled to membership in the Judicial Conference of the Tenth Circuit. They may be placed upon the mailing list by notification to the circuit executive. A name will be removed from the mailing list if the attorney does not attend two successive Judicial Conferences without being excused and does not make a renewed request to continue on the mailing list. 10th Cir. R. 47.3(D). Judicial Conferences are held every other year in even numbered years and are attended by all federal judges in the Tenth Circuit including magistrate and bankruptcy judges. They are also open to all attorneys who are members of the bar of the court.

Names, Addresses and Telephone Numbers of Court Officers and Offices

David Tighe, Circuit Executive, U.S. Courts of the Tenth Circuit, Byron White U.S. Courthouse, Denver, Colorado 80257; (303) 844-2067

Patrick Fisher, Clerk, U.S. Court of Appeals for the Tenth Circuit, Byron White U.S. Courthouse, Denver, Colorado 80257; (303) 844-5074

Niki Esmay Heller, Chief Staff Counsel, U.S. Court of Appeals for the Tenth Circuit, Byron White U.S. Courthouse, Denver, Colorado 80257; (303) 844-5306

J. Terry Hemming, Librarian, U.S. Court of Appeals for the Tenth Circuit, C-411 U.S. Courthouse, Denver, Colorado 80294; (303) 844-3591

David W. Aemmer, Chief Circuit Mediator, U.S. Court of Appeals for the Tenth Circuit, Byron White U.S. Courthouse, Denver, Colorado 80257; (303) 844-6017; FAX (303) 844-6437

Inquiries Concerning Rules, Procedures or Cases

The clerk and his staff welcome inquiries concerning rules and procedures. Cases are assigned on the basis of their origin to teams within the clerk's office. Case inquiries may best be answered by a member of the responsible team. Phone (303) 844-3157, after hours or when the automated attendant answers, **press 4**; then

for cases from Colorado or New Mexico, press 1; for cases from Kansas, Utah, Wyoming, Tax Court or United States government agencies, press 2; for any of the districts of Oklahoma, press 3. To speak to an operator, press 0. If you are not calling from a touchtone phone, remain on the line and an operator will assist you, if you are calling during normal business hours.

The court's rules are available electronically through Lexis® and Westlaw®. The rules, this *Guide* and a lot of other information about the court are available on the court's website at http://www.ck10.uscourts.gov

Additionally, opinions and dockets are posted on PACER (Public Access to Court Electronic Records) at http://pacer.ca10.uscourts.gov/index.php. To register as a PACER user, call the San Antonio center at (800) 676-6856. PACER is available around the clock seven days a week. The court's opinions are hosted on the world wide web by Washburn University School of Law Library at http://www.kscourts.org/ca10/. Access to the court's opinions on PACER (Public Access to Court Electronic Records) is at http://pacer.ca10.uscourts.gov.

Emergency matters or matters requiring special handling or interpretation of the rules should be directed to the Clerk, Patrick Fisher; or a deputy clerk at the central number for the clerk's office, (303) 844-3157. In emergencies arising outside regular office hours, or on weekends and holidays, inquiries may be directed to one of the following:

Patrick Fisher	**home phone** (303) 674-2245
Doug Cressler	**home phone** (720) 855-3199

MAJOR CASE PROCESSING EVENTS

MAJOR CASE PROCESSING EVENTS

Key:

USDC	*United States District Court*	FRAP	*Federal Rules of Appellate Procedure*
USCA	*United States Court of Appeals*	10thCR	*Tenth Circuit Rules*
USTC	*United States Tax Court*	IFP	*In Forma Pauperis*
USC	*United States Code*	NoA	*Notice of Appeal*
		RoA	*Record on Appeal*

WHAT	WHO	WHERE/WHEN	REFERENCE
Notice of Appeal	Appellant	Filed in USDC: Criminal Cases: within **10** days after entry of judgment, or **30** days if U.S. is the appellant Civil Cases: within **30** days after entry of the order or judgment, or **60** days if U.S. is a party Filed in USTC: Tax Cases: within **90** days after decision is entered	FRAP 4(b) FRAP 4(a) FRAP 13
Petition for Review	Petitioner	Filed in USCA: within time provided by statute	FRAP 15
Entry of Appearance	All parties	Within ten days of filing appeal or other proceeding	10th Cir. R. 46.1(A)

WHAT	WHO	WHERE/WHEN	REFERENCE
Filing and Docketing fees	Appellant or Petitioner	Paid to the clerk USDC or USTC when NoA is filed, unless appellant is IFP or U.S.: Filing fee $ 5.00 Docket fee $250.00 Paid to Clerk USCA in cases seeking review of administrative orders or other original proceedings: Docket fee $250.00	FRAP 3 28 USC § 1913
Preliminary Record	Clerk, USDC	Transmitted to USCA within **24** hours after NoA filed	10thCR 3.2
Docketing Statement	Appellant or Petitioner	Filed in USCA: within **10** days after NoA is filed in USDC or USTC, or within **14** days after petition for review is filed in USCA	10thCR 3.4, 14.1, 15.1
Transcript Order Form	Appellant	Delivered to court reporter and copies filed in USDC and USCA within **10** days after NoA is filed	FRAP 10(b)
Designation of Record	Appellant ***(Appeals with court-appointed counsel only)***	Filed in USCA within **10** days after NoA is filed	10thCR 10.2(A)(2)
Transcript	Court Reporter	Filed in USDC: Criminal Cases: within **30** days after ordered Civil Cases: within **60** days after ordered	10thCR 10.1 Appellate Transcript Management Plan
Record on Appeal	Clerk, USDC ***(appointed counsel or pro se only)***	Filed in USCA: when complete	FRAP 11(b), 10thCR 11.2

WHAT	WHO	WHERE/WHEN	REFERENCE
Appellant's or Petitioner's Opening Brief	Appellant or Petitioner	Filed in USCA: USDC Appeals/Retained Counsel: within **40** days of the date district court notifies the record is complete USDC Appeals/Appointed Counsel: per order of USCA entered after RoA is filed USTC Appeals: within **40** days after RoA is filed Agency Appeals: within **40** days after certified list or record is filed, whichever occurs first	10thCR 31.1(A)(1) FRAP 31(a), 10thCR 31.1(A)(2) FRAP 31(a)(1) 10thCR 31.1.3
Appellee's or Respondent's Answer Brief	Appellee or Respondent	Filed in USCA: within **30** days after service of Appellant's/ Petitioner's Brief	FRAP 31(a)(1)
Appellant's or Petitioner's Reply Brief	Appellant or Petitioner	Filed in USCA: within **14** days after service of appellee's or respondent's brief	FRAP 31(a)(1)
Oral Argument Calendars	Clerk, USCA	Issued **2 to 3 months** prior to oral argument	10thCR 34.1.1
Oral Argument Appearance	Appellant/ Petitioner **and** Appellee/ Respondent	As **set forth in calendar notice**: Counsel must check in with Clerk, USCA at least 30 minutes before court convenes session	10thCR 34.1(a)(1)

WHAT	WHO	WHERE/WHEN	REFERENCE
Decision	Judges, USCA	Usually several weeks to several months after submission	
Petition for Rehearing	Parties Seeking Rehearing	Filed in USCA: within **14** days after entry of judgment unless a civil case in which U.S. or agency or officer thereof is a party, then **45** days after the entry of judgment	FRAP 40
Bill of Costs	Prevailing Party	Filed in USCA: within **14** days after the entry of judgment	FRAP 39
Mandate	Clerk, USCA	Issued **7** calendar days after time for filing petition for rehearing expires, unless petition for rehearing is filed, then issued **7** calendar days after entry of any order denying the petition for rehearing	FRAP 41
Petition for Writ of Certiorari	Parties Seeking Writ	Filed with Clerk, **U.S. Supreme Court**, within **90** days of entry of judgment or denial of timely petition for rehearing	28 USC § 2101(c) Rule 13, Supreme Court Rules

THE APPELLATE PROCESS

I. TO APPEAL OR NOT TO APPEAL

The first decision the losing party in the district court or agency proceeding must make is whether to appeal at all. Counsel should consider the chances of success objectively when advising the client whether to file a notice of appeal. In addition, counsel should consider the costs of delay and possible sanctions if the appeal is found meritless. The sobering statistics are as follows:

A. *Delay*. During 2001 the median time from filing the notice of appeal to entry of the opinion was 11.2 months. This is slightly faster than the median time for all circuits. This circuit hears most criminal appeals as soon as they are fully briefed. Civil appeals without priority can, however, take much longer. The court has taken some extraordinary steps to speed up the appellate process, but delay remains a factor to consider in civil cases.

B. *Chances of Success*. The reversal rate in this circuit for the twelve month period ending June 30, 2002 was 10.2 % broken down as follows:

Criminal 6.3 %
U.S. Prisoner Petitions 12.3 %
U.S. Civil 12.1 %
Private Prisoner Petitions 9.0 %
Other Private Civil 14.6 %
Bankruptcy 5.6 %
Administrative Appeals 2.4 %

C. *Sanctions for Meritless Appeals*. If the court finds that an appeal is frivolous, it may award damages and single or double costs. Fed. R. App. P. 38. These costs may be awarded against counsel personally if the court finds the fault is with the lawyer. The test under Rule 38, and 28 U.S.C. § 1927, is whether

counsel exhibited objectively unreasonable conduct in pursuing the appeal. *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987) (en banc). Prisoners may forfeit good time credits if the court finds an appeal frivolous. Under the Prison Litigation Reform Act, a prisoner who brings three frivolous suits may not proceed without prepayment of fees. 28 U.S.C. § 1915(g).

See also 10th Cir. R. 40.1(B) for sanctions imposed for meritless petitions for rehearing. The responsibilities of counsel are discussed at length in Section XV. RESPONSIBILITIES OF COUNSEL.

II. INITIATING A PROCEEDING

A. *Jurisdiction.* Lawyers are responsible for determining whether a case is within the appellate jurisdiction of this court and is not premature. Generally speaking, the circuit court only has jurisdiction over final orders of the federal district courts within its territorial jurisdiction, *see* 28 U.S.C. § 1291, and final orders of a variety of federal administrative tribunals involving residents of the circuit. Certain district court orders that are final only as to some claims or some parties may be appealable under a district court certification order pursuant to Fed. R. Civ. P. 54(b). Likewise, a limited class of interlocutory orders may also be reviewed immediately. *See* 28 U.S.C. § 1292(b).

The circuit has the power to entertain writs of mandamus, prohibition, or the like in the rare cases in which they are appropriate. The court of appeals has no power to review decisions of state courts directly. The court may review certain state court decisions indirectly, in criminal cases, on appeal of habeas corpus proceedings initiated in federal district court.

The Federal Rules of Appellate Procedure govern all actions in the United States Courts of Appeals, whether by appeal from a district court, including a magistrate's judgment if authorized by 28 U.S.C. § 636(c)(3), as a matter of right or with permission; by appeal from the United States Tax Court; by petition for review or to enforce an agency order; or by an original proceeding. Fed. R. App. P. 1. In addition, the Tenth Circuit Rules govern all proceedings in this court. Fed. R. App. P. 47 and 10th Cir. R. 1.1. Depending upon the type of appellate proceeding, the initiating party is referred to as "appellant" or "petitioner" and the adversary as "appellee" or "respondent".

B. *Appeals from District Courts*

Parties seeking to appeal a final judgment or order of a district court must file a notice of appeal with the district clerk within the time prescribed. Fed. R. App. P. 3(a). The notice of appeal must name all of the parties seeking to appeal. It must also designate the judgment or order on appeal, and must name the court where the appeal is taken. Fed. R. App. P. 3(c). Form 1 in the Forms following the Federal Rules of Appellate Procedure is a suggested notice of appeal.

The district clerk notifies the other parties by mail that a notice of appeal was filed. The clerk transmits a copy of the notice, with the preliminary record to the circuit clerk. The preliminary record consists of the order or judgment appealed and any post judgment motions. Fed. R. App. P. 3(d) and 10th Cir. R. 3.2.

1. *Time for Filing Notice of Appeal.*

a. *Civil Cases:*

(i) If the government is not a party, the notice of appeal must be filed within 30 days after entry of the judgment or order appealed from. Fed. R. App. P. 4(a)(1)(A).

(ii) If the government is a party, any party may file a notice of appeal within 60 days after entry of the judgment or order appealed from. "Government" means the United States or its officer or agency. Fed. R. App. P. 4(a)(1)(B).

(iii) If a party files a timely notice of appeal, any other party may file a notice of appeal within 14 days of that date, even though the otherwise prescribed time to appeal has expired. (For example, if one party files a notice of appeal on the twenty-ninth day in a case in which the government is not a party, any other party may file a notice of appeal up to and including the forty-third day. If, however, one party files a notice of appeal on the fifth day, any

other party may still wait until the thirtieth day to file a notice of appeal.)

b. *Criminal Cases*:

(i) A defendant's notice of appeal must be filed within 10 days after entry of the judgment or order appealed. Fed. R. App. P. 4(b)(1)(A).

(ii) A notice of appeal by the government, when authorized, must be filed within 30 days after entry of the judgment or order appealed. Fed. R. App. P. 4(b)(1)(B).

NOTE - The prescribed times for filing a notice of appeal are jurisdictional and may not be extended by the court of appeals. Fed R. App. P. 26(b). Under appropriate circumstances, the district court may grant a limited extension of time if the application is filed within 30 days of the time permitted for filing the notice of appeal. Fed. R. App. P. 4.

2. *Calculation of Time.*

a. *Final judgments*. As a general rule, appeals of right must be taken from final judgments. *See* 19 Moore's Federal Practice chapter 202 (3d Ed. 1997)(addressing final judgment rule). Appeals from certain interlocutory orders, however, are expressly authorized by statute. The time for appealing those orders is the same as that for other civil appeals. In addition, Rule 54(b) of the Federal Rules of Civil Procedure authorizes the district court to permit an immediate appeal from an otherwise nonappealable interlocutory order. The court may make a specific finding that there is no just reason for delay and may direct the district court clerk to enter judgment as to one or more, but fewer than all, of the claims or parties. The time for filing the appeal starts from the date the district clerk enters the otherwise interlocutory order as

final. Absent a Rule 54(b) certification, a notice of appeal filed before entry of the final judgment is premature and subject to dismissal. The notice may be sufficient if the district court enters a final judgment in the case prior to dismissal of the appeal in this court. *Lewis v. B. F. Goodrich Co., et al*, 850 F.2d 641 (10th Cir. 1988)(en banc) and *FSLIC v. Huff,* 851 F.2d 316 (10th Cir. 1988)(en banc).

b. *Commencement of Time.* The time for filing a notice of appeal runs from the **entry** of judgment, i.e., when the district clerk enters the judgment or order appealed on the district court docket sheet. The district judge's announcement of a decision, sentence or order or an opinion or memorandum decision including the words "so ordered" does not constitute the final judgment. The district clerk must enter a separate judgment, and the time to file a notice of appeal runs from that entry. Fed. R. App. P. 4(a)(7). The district clerk is required to notify all proper parties to an action of the entry of the judgment or order. Absence of notice may be a condition for reopening the time for filing the notice of appeal. Fed. R. App. P. 4(a)(6).

c. *Premature Notice of Appeal.* A notice of appeal filed after the announcement of a decision, sentence or order, but before the entry of judgment, in either a civil or criminal case, is treated as filed on the date of and after the entry. Fed. R. App. P. 4(a)(2) & (b)(3)(B). This is also true of a notice of appeal filed after a conditional guilty plea but before sentencing in a criminal case. *Green v. United States*, 847 F.2d 622 (10th Cir. 1988)(en banc).

d. *Effect of Postjudgment Motions in Civil Cases.* Timely filing of any of the following motions in a civil case by any party will suspend the time otherwise prescribed for filing a notice of appeal:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered.

NOTE - A notice of appeal filed in a civil case before disposition of any of the motions enumerated in Fed. R. App. R. 4(a)(4) has no effect until entry of the order disposing of the last such motion and will have no effect as to orders entered after the date of the notice of appeal. To appeal the order, or any modification of the judgment, an amended notice of appeal must be filed. *See* Fed. R. App. P. 4(b). If fees were paid when the first notice of appeal was filed, they will be applied to the subsequent notice of appeal and no additional fees will be required.

e. *Postjudgment Motions in Criminal Cases*. Similarly, timely filing of a motion for a judgment of acquittal, for arrest of judgment, or for a new trial other than for newly discovered evidence, or for newly discovered evidence if filed within 10 days after entry of judgment, tolls the time for filing the notice of appeal.

3. *Fees*. Every appellant, except the United States or its officer or agency, must pay the required fees ($5.00 filing fee and $250.00 docketing fee) to the district clerk when a notice of appeal is filed. Failure to pay the required fees may result in dismissal of the appeal, as well as revocation of bond in a criminal appeal. Fed. R. App. P. 3(e). A litigant who is unable to pay the fee may move

for leave to proceed without prepayment of fees. Abuse of leave to proceed in forma pauperis may lead to the imposition of filing restrictions. A prisoner who has no funds may pay a portion of the fee and the rest in installments. 28 U.S.C. § 1915(b)(1). A prisoner who has had three prior cases dismissed as frivolous or malicious or for failure to state a claim may not proceed without full prepayment of the fee. 28 U.S.C. § 1915(g).

The *Prison Litigation Reform Act of 1995*, Pub. L. No. 104-134, 110 Stat. 132 (April 26, 1996) imposes special restrictions on prisoners. Among other requirements, they must provide a certified statement of their prison accounts for the six months prior to filing the application to proceed without prepayment. Statements must be obtained from every institution in which the prisoner was in custody during the six-month period. If the applicant has insufficient funds to pay the entire fee, the court is required to assess the account and, when funds become available, collect a partial payment of the fee. After the initial assessment, the monthly payments must be deducted from the account until the full fee is paid.

4. *Bond for costs on appeal in civil cases*. In a civil case, the district court may require appellant to file a bond to ensure payment of costs on appeal. Fed. R. App. P. 7. Failure to comply with a district court order requiring a cost bond may be grounds for dismissal of the appeal. The cost bond secures only costs on appeal. It is different from a supersedeas bond, which secures a money judgment while the appeal is prosecuted.

C. *Appeals from Judgments Entered by Magistrates in Civil Cases*

A judgment entered by a United States magistrate judge pursuant to 28 U.S.C. § 636(c)(1) may be appealed to this court in accordance with 28 U.S.C. § 636(c)(3). The appeal must be taken the same way as other appeals from district court judgments. Fed. R. App. P. 3.1. Following appeal from a magistrate's

decision to a judge of the district court pursuant to 28 U.S.C. § 636(c)(4), a party may petition this court pursuant to 28 U.S.C. § 636(c)(5) for leave to appeal the district court's decision. The petition will be processed in the same manner as all petitions for permission to appeal. *See* Fed. R. App. P. 5.

D. *Appeals by Permission from Interlocutory Orders*

A party may petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) and Fed. R. Civ. P. 23(f). A permissive appeal under § 1292(b) requires a particularized statement from the district court. An order may be amended at any time to include the prescribed statement. Fed. R. App. P. 5(a)(3).

NOTE - Interlocutory district court orders certified under § 1292(b) may be appealed only after permission to appeal is obtained from the court of appeals. Absent such permission even appeals from orders certified by the district court are subject to dismissal for lack of jurisdiction. In contrast, orders made final under Fed. R. Civ. P. 54(b) are directly appealable and do not require discretionary approval by the court of appeals.

1. *Requesting Permission to Appeal*. To request permission to appeal, a party must file an original and three copies of a petition for permission to appeal with the circuit clerk. The petition must include proof of service on all parties to the action in the district court.

2. *Time for Filing*. The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no time is specified, within the time noted in Rule 4(a) for filing a notice of appeal. Fed. R. App. P. 5(a)(2).

3. *Processing the Petition and Answer*. The clerk will enter the petition on the docket. Adverse parties may file an answer within seven days after service of the petition. When the time for filing answers has expired, the clerk will submit

the petition and answer, if any, to the court. There will be no oral argument on the petition unless the court orders it. Fed. R. App. P. 5(b)(3).

4. *Granting of Permission.* Within ten days of entry of an order granting permission to appeal, the appellant must pay the required docket fee ($250.00) to the district court clerk and must file a bond for costs if required pursuant to Fed. R. App. P. 7. Upon notification that the docket fee has been paid, the clerk of this court will enter the appeal on the docket. If no fee is required, the clerk must enter the appeal on the docket after the order granting permission to appeal is entered. A notice of appeal need not be filed. The time for performing acts under the Federal Rules of Appellate Procedure and the Tenth Circuit Rules which normally run from the filing of the notice of appeal will run from the date of entry of the order granting leave to appeal. Fed. R. App. P. 5(d)(2).

E. *Review of Decisions of the United States Tax Court*

An appeal from a United States Tax Court decision is taken by filing a notice of appeal with the clerk of the Tax Court in Washington, D.C. The Tax Court clerk notifies all other parties by mail that a notice of appeal has been filed. The content of the notice is the same as in appeals from district courts. Fed. R. App. P. 13(b) and (c). Form 2 of the Forms following the Federal Rules of Appellate Procedure is a suggested form of the notice of appeal.

1. *Time for Filing*. A notice of appeal from a decision of the Tax Court must be filed within 90 days of entry of judgment. If a timely notice of appeal is filed, any other party may appeal by filing a notice within 120 days after entry of the decision of the Tax Court. Fed. R. App. P. 13(a)(1). A notice of appeal may be filed by mail addressed to the clerk. In that case the postmark date is considered the date of filing. A notice of appeal mailed to the clerk and postmarked within the time for filing will be considered timely filed even if the clerk receives it after

expiration of the prescribed time. Fed. R. App. P. 13(b).

NOTE - This provision applies only to Tax Court appeals.

2. *Tolling of Time for Filing a Notice of Appeal*. A timely motion to vacate or revise a decision, made in conjunction with the Rules of Practice of the Tax Court, tolls running of time for filing a notice of appeal. The filing time will begin to run again for all parties upon entry of the order disposing of the motion, or from entry of the revised decision, whichever is later. Fed. R. App. P. 13(a)(2).

F. *Review or Enforcement of Agency Orders*

Review of an agency order may be obtained by filing a petition for review with the circuit clerk. The form of a petition is similar to that of a notice of appeal. Form 3 of the Forms following the Federal Rules of Appellate Procedure is a suggested form of a petition for review. The respondent is the appropriate agency, board or officer. The United States may also be a respondent if required by statute. When a statute provides for enforcement of an agency order by a court of appeals, an application for enforcement may be filed with the circuit clerk. The clerk serves the respondents with copies of the petition for review or application for enforcement but the petitioner must serve a copy on all other parties to the administrative proceedings and file with the clerk a list of those parties served. No response to a petition for review is required. If an application for enforcement is contested, however, the respondent must serve and file an answer within 20 days after the application for enforcement is filed. Failure to answer will result in judgment by default. A respondent may file a cross-application for enforcement if the court has jurisdiction to enforce the order. All cross-applications will be filed proceeding which is already docketed, no new number will be assigned. The two

matters will be briefed and submitted as a single proceeding. Fed. R. App. P. 15(a), (b) and (c).

A docket fee of $250.00 must be paid when a petition for review is filed. Failure to pay the required fee is grounds for dismissal. 10th Cir. R. 3.3(B) and 20.1.

1. *Time for Filing Petition or Application.* A petition for review or application for enforcement must be filed within the time prescribed by the applicable statute. That time varies from agency to agency.

2. *Contents and Number of Copies of Petition for Review and Application for Enforcement.* A petition for review or application for enforcement should contain a concise statement describing the underlying proceeding, any reported citation of the order at issue, the facts on which venue is based and the relief requested. The original and sufficient copies for each respondent must be filed with the circuit clerk. A respondent must serve and file an answer to an application for enforcement within 20 days. Otherwise, judgment will be awarded as requested. Fed. App. P. 15(b)(2).

G. *Original Proceedings*

To submit an application for a writ of mandamus or prohibition directed to a judge, or a petition for another extraordinary writ, the initiating party must file an original and three copies with the circuit clerk. Proof of service on the respondent judge or judges and on all parties to the action in the trial court is required. The clerk may not submit the petition to the court until the prescribed docket fee of $250 is paid or the petitioner has submitted a proper motion for leave to proceed in forma pauperis. Fed. R. App. P. 21(a)(3). Prisoners may be required to pay a portion of the fee before the petition is submitted and the rest in installments.

1. *Time for Filing a Petition*. Extraordinary writs are usually matters of great urgency; no time limit is prescribed.

2. *Contents of the Petition*. The petition must contain a statement of the issues, the facts necessary to an understanding of the issues, the relief sought, and the reasons why the writ should issue. If the case requires a decision by a date certain, that date should be prominently stated. Copies of an opinion or order or necessary parts of a record must also be included. Fed. R. App. P. 21(a)(2)(B). The petition must be titled "In re [name of petitioner]." Fed. R. App. P. 21(a)(2)(A).

3. *Further Proceedings*. If the court anticipates denying the petition, it generally does so without calling for an answer. It may however, issue an order fixing a time for filing an answer. The clerk serves the order on all persons directed or invited to respond. Fed. R. App. P. 21(b)(2). All parties other than petitioner are respondents for all purposes. Ordinarily the court will decide the petition on its merits at that point. Occasionally the court will call for briefing and set the matter for oral argument. It is rare for the court to set oral argument on these matters.

III. DOCKETING STATEMENT

A. *Appeals from District Courts*

In every appeal to this court from a district court judgment or order, the appellant must file a docketing statement with the circuit clerk within 10 days after the notice of appeal is filed. 10th Cir. R. 3.4(A). If the court of appeals has not yet assigned a docket number, the district court docket number is sufficient to identify a docketing statement.

Docketing statements are used to categorize appeals and identify those with possible jurisdictional defects (*e.g.*, nonappealable orders or untimely notices of appeal) or appeals which, because of their nature or circumstances, may require expeditious or other special processing. The docketing statement is not a brief and does not limit the issues which may ultimately be raised on appeal. Although appellants and their counsel are encouraged to consider carefully the issues raised on appeal and to include them in the docketing statement, omission of an issue from the docketing statement does not preclude argument on that issue in appellant's brief. The docketing statement should not contain argument. The court **strongly** disfavors motions to strike or amend the docketing statement and arguments over its contents.

1. *Form and Content of Docketing Statement.* The docketing statement must be in a form approved by this court, 10th Cir. R., Form 1, and must include all of the required information and attachments. A copy of each of the following documents **must be attached** to the docketing statement when it is filed in the court of appeals:

a. the district court docket entries, including an entry for the notice of appeal;

NOTE - The copy of the docket entries must be obtained from the district court clerk after the notice of appeal is entered. The district court clerk must charge appellant for copy work. The copy may also be obtained from the district court's PACER system – an electronic bulletin board. Many districts now have pages on the world wide web.

b. the final judgment or order appealed from;

c. any pertinent findings and conclusions, opinions, or orders, which form the basis for the appeal;

d. any motion filed under Fed. R. Civ. P. 50(b), 52(b), 54, 59 or 60, including any motion for reconsideration, together with the dispositive order, if any;

e. any motion for extension of time to file the notice of appeal, with the dispositive order, if any; and

f. the notice of appeal.

2. *Filing and Service.* Within 10 days after the notice of appeal is filed, appellant must file an original and four copies of the docketing statement with the circuit clerk. Copies of the documents listed above and in the docketing statement instructions **must be attached** to the original and all copies of the docketing statement. If a docketing statement is not filed, the appeal may be dismissed. 10th Cir. R. 42.1.

3. *Appeals by Permission from Interlocutory Order.* In appeals by permission from interlocutory orders the appellant must file the docketing statement with the circuit clerk within 10 days after entry of the order granting leave to appeal. Fed. R. App. P. 5. Since no notice of appeal is filed, it need not be attached to the docketing statement and the copies of the district court docket entries need not contain an entry for it. All other requirements as to form,

content, filing and service of the docketing statement apply to appeals by permission.

B. *Review of Decisions of the United States Tax Court and Review or Enforcement of Agency Orders*

In cases involving review of decisions of the United States Tax Court the appellant/petitioner must file the docketing statement with the clerk of this court within 10 days after the appeal is docketed. 10th Cir. R. 14.1 (applying 10th Cir. R. 3 to Tax Court cases). In cases involving review or enforcement of agency orders, the filing party must file a docketing statement with the clerk of this court within 14 days after the petition for review or application for enforcement is filed. 10th Cir. R. 15.1(applying R. 3 to agency cases). Docketing statements must be filed in a form approved and provided by the court. 10th Cir. R., Form 1. The filing party must attach copies of the following documents to the original and all copies of the docketing statement:

1. the Tax Court or agency docket entries showing entry of the judgment or order appealed from or to be reviewed or enforced and, in the case of the Tax Court, with entry of the notice of appeal;

2. the decision, judgment or order appealed from or to be reviewed or enforced;

3. the notice of appeal or the petition for review or application for enforcement.

An original and four copies of the docketing statement must be filed. The docketing statement must contain proof of service on all other parties to the appeal or proceeding in this court.

IV. RECORDS AND APPENDICES

The record on appeal is the original papers and exhibits filed in the district court, a certified copy of the docket entries prepared by the district clerk, and the transcript of proceedings, if any, filed with the district clerk. Fed. R. App. P. 10(a). Except in pro se appeals, in cases with retained counsel, the record is submitted to the court in an appendix. Whether a record or appendix is required in a particular appeal depends upon whether appellant's counsel is court-appointed or retained. In pro se appeals, the district court prepares and transmits a record. In cases in which appellant is represented by retained counsel, appellant must file an appendix in accordance with 10th Cir. R. 30. 10th Cir. R. 10.2(B). The appendix requirement applies to bankruptcy cases, too. 10th Cir. R. 6.1. If appellant's counsel is retained, it is appellant's duty to include all necessary documents and transcripts in the appendix. The record from the trial proceedings remains in the district court. Fed. R. App. P. 30(f). The court of appeals is not required to remedy appellant's failure to provide an adequate appendix. 10th Cir. R. 10.3(B). If appellant's counsel is appointed, appellant must designate parts of the record for transmission to the court of appeals by the district court. An appendix is not required. 10th Cir. R. 10.2(A). If **any** appellant in a companioned or consolidated appeal is represented by court-appointed counsel, then all appellants must also designate the record and no appendix is required.

A. *Appendices*

Because appellate review is based on the record, the most important part of appellant's case is the presentation of the record in the appendix. What and how much to include presents a dilemma. The court requires a limited appendix because it is easier to work with. At the same time, counsel must provide an

appendix that is sufficient for consideration and determination of the issues on appeal. 10th Cir. R. 30.1(A). The court may decline to consider an issue if the appendix is inadequate to consider fully that issue. Analogy to the rules governing preparation of a record on appeal is helpful. If sufficiency of the evidence is an issue, the entire trial transcript must ordinarily be provided. 10th Cir. R. 10.1(A)(1)(a). When less than the entire transcript is necessary, the elided transcript must clearly identify the speakers. If the transcript provided does not start at the beginning of a witness' testimony, the witness and the other speakers must be identified. The court has ruled that all or certain portions of the record must be provided for review in certain cases. For example, in appeals of social security cases, the entire administrative record must be included in the appendix. In addition counsel should note that when an objection is made to a magistrate judge's report and recommendation, the objection must be included.

Those items excluded from the record on appeal by 10th Cir. R. 10.3(E) should not be included in an appendix unless they are necessary to support an issue on appeal. Those items required in the record by 10th Cir. R. 10.3(C) and (D) must be included in the appendix.

NOTE - The parties are encouraged to agree on the contents of the appendix. Upon motion of a party, the court will defer filing of the appendix until completion of briefing so a joint appendix can be filed.

1. *Form of the Appendix*. The cover should look like the cover of a principal brief. The appendix must be indexed and paginated throughout. Each page of the appendix must be numbered seriatim. Documents or excerpts of documents included in the appendix should be arranged in chronological order beginning with the oldest document. A copy of the district court docket sheet, recent enough to show the filing of the notice of appeal and any postjudgment motions, should be

the first document in the appendix.

A good appendix is easy to handle and read. If the volume is more than two and a half inches thick it will be hard to hold. If a larger appendix is required, use multiple volumes. The best volumes lie flat when open. Counsel must insure that all copies are legible. Appellate judges read constantly. Hard to read copy or condensed transcript makes the court's work more difficult.

NOTE - Even though the pertinent orders and the judgment appealed must be in the appendix, they must also be bound with each copy of appellant's opening brief.

2. *Sealed Documents*. Documents that are not part of the public record, including for example, pre-sentence investigation reports or discovery documents that were sealed by the district court, should be filed in separate volumes. Two copies of the separate volume or volumes in separate sealed envelopes must be submitted. To make an effective cover for the sealed envelope, counsel may tape a copy of the cover of the document to the envelope. Except for presentence investigation reports, which are sealed by 10th Cir. R. 11.3(E), a motion for leave to file documents under seal is required. Documents tendered under seal will be held under seal provisionally pending a ruling on whether to seal.

3. *Exhibits*. After trial most exhibits are returned to the parties who presented them. The district courts cannot store exhibits, nor can the court of appeals. Exhibits returned to the parties may be presented in a single addendum to the appendix or duplicated and bound with the other appendix documents. Determining which method is better will depend on the content of the exhibits. Documents would be easier to present in an appendix while photographs or diagrams might better be presented in an addendum.

4. *Appellee's Appendix*. If appellant fails to provide necessary record items, appellee may provide them in a supplemental appendix filed with appellee's

principal brief. Disputes over the contents of the appendix are not productive and are disfavored. Copy costs can be recouped under Fed. R. App. P. 39.

5. *Exemptions*. If leave is granted, items in the record that cannot be copied may be submitted separately. The exemption provision also covers pro bono counsel who is representing a client who cannot afford to copy the record. In appropriate cases, this court may prevail upon the district court to copy a record for transmission even if counsel is not appointed.

B. *Record on Appeal*

Though the record on appeal includes, and the court of appeals may examine, anything filed in the district court, some documents on file in the district court may not be necessary for an adequate presentation of the issues on appeal and should not be designated for transmission to the court of appeals. Designating unnecessary record material for transmission to the court of appeals contributes to the delay and expense of the appeal. The court's requirement that the parties specifically designate those portions of the record they wish the district court clerk to transmit is designed to reduce the record to only those materials necessary for the appeal. Because appellate review is based on the record designated, however, and because the court of appeals will not normally consider matters outside the record the parties designated, it is important that the designated record contain **all** materials necessary to an adequate presentation of the issues on appeal. This court may refuse to consider an issue if appellant does not designate an adequate record. 10th Cir. R. 10.3(B).

1. *Transcripts*

a. *Necessary Transcripts*. "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence

relevant to that finding or conclusion." Fed. R. App. P. 10(b)(2). If the appeal challenges the trial court's admission or exclusion of evidence, the giving or failure to give a jury instruction, or any other ruling or order, the record transmitted to this court must include a transcript of those portions of the proceedings where the evidence, offer of proof, instruction, ruling and order and any necessary objections are recorded. 10th Cir. R. 10.3(D)(1). Counsel should exercise discretion in deciding whether to order transcripts because they significantly increase the time and expense of an appeal. In some cases stipulations may avoid or reduce the need for transcripts. 10th Cir. R. 10.1(A)(1)(b). The fact that transcript has been ordered and filed with the district clerk does not mean that all or any of it must be designated for inclusion in the record transmitted to the court of appeals. Only those portions of transcripts which are necessary to adequately present the issues on appeal and which are identified in the briefs may be designated. Opening remarks and examination of jurors must be omitted from transcripts in criminal cases unless specifically drawn in issue on appeal.

NOTE - Appellants must be wary. While only a portion of the record may be necessary to demonstrate error, harmless error analysis requires the entire transcript.

b. *Ordering Transcripts.* To order necessary transcripts parties must complete a transcript order form approved by this court and distributed by the district clerk, must serve copies on the court reporter, the district clerk and all other parties to the appeal, and file a copy in the court of appeals. The ordering party must make satisfactory arrangements with the court reporter for payment of the cost of the transcript. If payment will come from the United States under the Criminal Justice Act, the form must identify the appeal as one proceeding under the CJA. The order is not complete until financial

arrangements which are satisfactory to the court reporter have been made. 28 U.S.C. § 753(f) and 10th Cir. R. 10.1(B)(3). On completion of the transcript order, the court reporter must acknowledge its receipt, estimate the completion date and the number of pages in the completed transcript, and file a completed copy with this court and with the district clerk. 10th Cir. R. 10.1(B)(2). If the **entire** transcript will not be included in the record on appeal, within the time for ordering a transcript, appellant must file a statement of the issues on appeal. Fed. R. App. P. 10(b)(3)(A). The docketing statement may serve as such a statement. Within 10 days after service of the transcript order form and the statement of issues, the appellee may file and serve on appellant a designation of additional transcript. If within 10 days after service of such designation, appellant does not order the additional transcript, appellee may order it during the next 10 days or may move in the **district court** for an order requiring appellant to do so. Fed. R. App. P. 10(b)(3)(C).

NOTE - Appellant must complete and file a transcript order form even if no transcript is being ordered. The reason that no transcript is ordered must be stated on the form. The transcript order form must be filed and served but no copy need be served on the court reporter. 10th Cir. R. 10.1(A)(2).

c. *Time for Ordering Transcripts.* Appellant must order necessary transcript, not already on file, within 10 days after filing the notice of appeal, or, within the same time, must state why no transcript is ordered. Because time required for the production of transcripts is a major cause of delay in appeals, appellants are urged to order necessary transcript as soon as possible after the notice of appeal is filed. In a criminal appeal in which appellant requests that the appeal be expedited on the ground that the sentence imposed is one year or less, necessary transcript must be ordered at the time the notice of appeal is filed. If the transcript is not ordered in a timely fashion, the court does not favor

motions for extensions of time to file briefs on the ground that the transcript is not available.

d. *Filing Transcripts*. Court reporters must prepare and file transcripts as required by the Tenth Circuit Appellate Transcript Management Plan. When a transcript is complete, the court reporter must file it with the district clerk and notify the circuit clerk and the parties that it was filed. Fed. R. App. P. 11(b)(1)(C) and 10th Cir. R. 10.1(C)(2).

e. *Unavailability of Transcripts.* In the event that transcripts are unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection, and serve it on the appellee, who may serve objections or proposed amendments within 10 days. The **district court** then settles and approves the statement and objections or amendments and the resulting statement is included in the record on appeal. Fed. R. App. P. 10(c).

2. *Designation of Record*. In order to reduce the size of the record transmitted to this court, parties who are represented by appointed counsel are required to designate record materials for transmission by the district court clerk. 10th Cir. R. 10.2(A). Pro se parties are not required to file a designation. 10th Cir. R. 10.2(C). In preparing the designation, counsel should remember that the record on appeal includes everything filed in the district court, *i.e.*, the original papers and the transcript of proceedings. Parties should designate only original papers and portions of transcripts deemed essential to adequate presentation of the issues on appeal, and only to the extent that they are specifically referred to in the briefs. The court has identified certain items which may not be included in the record without specific authorization. 10th Cir. R. 10.3(E). These are:

- appearances;
- bills of costs;

- briefs, memoranda, and points of authority (except as specified in 10th Cir. R. 10.3(D)(2));
- certificates of service;
- depositions, interrogatories, and other discovery matters, unless used as evidence;
- lists of witnesses or exhibits;
- notices and calendars;
- procedural motions or orders;
- returns and acceptances of service;
- subpoenas;
- summonses;
- setting orders;
- unopposed motions granted by the trial court;
- nonfinal pretrial reports or orders; and
- suggestions for voir dire.

In addition to the original papers, the designation should include necessary parts of the transcript. To repeat: all transcripts on file with the district court should not automatically be included in the record transmitted to this court and counsel should designate only essential parts for transmission. 10th Cir. R. 10.2.1.

NOTE - If trial exhibits are referred to in a brief, copies of such exhibits must be filed in a separate addendum to the brief. The addendum must include a table of contents and must have a cover page in the same form as the cover page on the brief. Only one copy of the addendum should be filed, 10th Cir. R. 10.3.2(d), but copies must be served on other parties to the appeal. Parties filing an appendix may include exhibits in the appendix (both copies).

a. *Form of Designation.* The required designation of record must be made on a form approved by this court and **distributed by the district clerk**. A current copy of the district court docket sheet, including the cover and subsequent pages identifying parties and counsel, must be attached to the designation. Documents are designated by circling the applicable docket entry number on the district court docket sheet. Portions of transcripts on file with the district court clerk which are required for review on appeal must also be designated, for transmission to the court of appeals. Permission of the court is required to designate original papers or other documents excluded by 10th Cir. R. 10.3(E).

b. *Filing and Serving Designation.* The designating party must file the designation with the district clerk and must serve copies on all other parties to the appeal and the circuit clerk. 10th Cir. R. 10.2.2.

c. *Time for Filing Designation.* In an appeal or in a group of companion or consolidated appeals in which any party is represented by court-appointed counsel, appellant or appellants must file and serve the designation of record within 10 days after the notice of appeal is filed. The appellees may file a designation of additional record within 10 days after service of appellant's designation.

3. *Transmission of Record.* In an appeal or group of companion or consolidated appeals in which any party is represented by court-appointed counsel, or in a pro se appeal, the record will be transmitted to the court of appeals as provided by Fed. R. App. P. 11(b)(2) and 10th Cir. R. 11.2(A).

4. *Correction and Modification of the Record.* Before or after the record is transmitted to this court, parties may apply to the district court or this court to correct or modify the record. Fed. R. App. P. 10(e). Motions for correction should be presented first to the district court. Likewise, motions to supplement

the record with original papers or transcripts on file in the district court should generally be filed in the **first instance in the district court.** Motions to supplement the record with items excluded by 10th Cir. R. 10.3.3 or with material not filed in the district court must be filed in this court.

5. *Agreed Statement as Record*. Instead of designating record for transmittal to the court of appeals, Fed. R. App. P. 10(d) provides that the parties may prepare a statement of the case for approval by the district court; and, if approved, the statement will be certified as the record on appeal and transmitted to the court of appeals by the district clerk. This is an unusual procedure and the court does not favor it.

C. *Record in Appeals From the United States Tax Court*

In appeals from the United States Tax Court, Fed. R. App. P. 10, 11, 12, and 13(d) govern the record and the time and manner of its transmission. Within 10 days after the notice of appeal is filed the appellant must order any necessary transcripts of the proceedings or must certify that no transcripts are being ordered. When the record is complete for purposes of the appeal, the clerk of the Tax Court will transmit it to the court of appeals. The parties are not required to designate the record.

D. *Record on Review or Enforcement of Agency Orders*

In cases involving review or enforcement of agency orders, the agency may file a certified list of the documents, transcripts of testimony, exhibits and other material comprising the record. In the alternative, the agency may file a certified list of the materials the parties have designated. Fed. R. App. P. 17(b). Copies of the original record materials must be transmitted to this court within 21 days after service of respondent's brief. 10th Cir. R. 17.1. The parties are encouraged to

designate only the portions of the agency record that are essential for a thorough review of the issues presented.

V. CIRCUIT MEDIATION OFFICE

The Circuit Mediation Office conducts mediation conferences under Federal Rule of Appellate Procedure 33 and Tenth Circuit Rule 33.1. The office is staffed by attorney-mediators who conduct telephone and in-person conferences primarily to explore the possibilities of settlement, and secondarily to resolve procedural problems.

A. Cases Scheduled for Mediation Conferences

1. *Initiated by the Circuit Mediation Office.* Within 10 days of filing a notice of appeal, appellants are required by Tenth Circuit Rule 3.4 to file a docketing statement in which they state the issues being raised on appeal and the background of the case. The Circuit Mediation Office schedules a case for a mediation conference from the docketing statement, usually before briefing and sometimes before the transcript is completed.

A mediation conference may be scheduled in any civil case except pro se and habeas corpus appeals. Conferences are not scheduled in criminal appeals.

2. *Initiated at a Party's Request.* In the event that a case is not scheduled for a conference, a party may request one by calling the Circuit Mediation Office at (303) 844-6017. If appropriate, **the fact that a conference has been requested is kept confidential.** Requested conferences are scheduled and approached in the same manner as those initiated by the Circuit Mediation Office.

B. *Mediation Conference*

The primary purpose of the conference is to explore the possibilities of settlement. It is also used to clarify issues and resolve procedural problems that may interfere with the smooth handling or disposition of the case. The conference

is ordinarily conducted early in the appeal, prior to briefing. Typically conferences are conducted by telephone, although in some cases counsel and clients are required to attend in person.

The mediators conduct the conferences in a series of joint and separate sessions, talking with both sides together and then with each side separately. While talking together at the beginning, the mediators usually ask counsel about any procedural questions or problems that could be resolved by agreement. These might include questions about the appendix or the need for a specially tailored briefing schedule. The mediators often review the appellate issues. The purpose of this discussion is **not** to decide the case or reach conclusions about the issues but to understand the issues and evaluate the respective risks on appeal. In many cases a candid examination of these risks is helpful in reaching consensus on the settlement value of the case. The review may be done with all parties present or with each side privately.

Counsel should set aside at least two hours for the initial conference. In some cases, discussions may go no further. In other cases, follow-up discussions may continue for days, weeks, or longer. If a settlement is reached, the parties will be given a date certain for the filing of a stipulation stating that the case has settled. If agreement is reached on matters that would facilitate the handling of the appeal (such as modification of the briefing schedule, etc.), an appropriate order reflecting such agreement is issued.

Counsel should note that the mediation program operates separately from the court's decisional processes. Filing deadlines are not automatically extended. Counsel are required to meet their filing deadlines unless the mediator extends them.

C. *Preparation for the Conference*

In order for settlement discussions to be most effective, lead counsel – the attorneys on whose judgment the clients rely when making decisions – are required to consult with their clients regarding settlement prior to the conference and to have as much settlement authority as feasible. Lead counsel should also be thoroughly familiar with the issues of the case and be prepared to discuss them as necessary.

The Circuit Mediation Office attempts to identify lead counsel for all parties when scheduling conferences. This is not always possible, so addressees are asked to advise the Circuit Mediation Office in advance of the conference when other counsel, or parties, should be involved.

D. *Mandatory Participation – Voluntary Settlement*

Although mediation conferences are relatively informal, the court considers them official proceedings and requires the participation of all parties, usually through their counsel. *See Pueblo of San Ildefonso v. Ridlon*, 90 F.3d 423 (10th Cir. 1996). Participation in the process is mandatory; decisions regarding settlement are, of course, voluntary. Sometimes the purposes of the conference cannot be achieved without the involvement of individuals or groups who are not parties to the appeal, and they may be invited to participate.

E. *Confidentiality*

To encourage full and frank discussion, all communications in the course of a conference or in any subsequent discussions are kept confidential. Nothing said during the discussions is placed in the record or disclosed in any way to any court by the mediator. Similarly, counsel and parties may not refer to or quote any statement made during the course of these discussions in their briefs or at oral

argument, or in any proceeding in any other court. *See Clark v. Stapleton Corp.*, 957 F.2d 745 (10th Cir. 1992).

F. *Counsel Conferences*

Counsel are reminded that Tenth Circuit Rule 33.2 requires appellant's/ petitioner's counsel to initiate a conference with opposing counsel to fully explore settlement no later then 30 days after the filing of the last brief. Counsel do not have this obligation in those cases in which the Circuit Mediation Office has conducted a mediation conference. A Rule 33.2 conference is also not required in cases involving pro se litigants, relief from criminal convictions, and social security appeals.

VI. WRITING A BRIEF

A. *Formal Requirements as to Content*

1. *Principal Briefs*. Federal Rule of Appellate Procedure 28 and Tenth Circuit Rule 28 set out the requirements for briefs filed in appeals. The opening and answer briefs must contain the following, under appropriate headings and in the order indicated:

a. A table of contents with page references, and a table of cases, statutes and other authorities cited, alphabetically arranged and referring to the pages of the brief where they are cited. Appended to the table of cases must be a list, with appropriate citations, of all prior or related appeals, or a statement that there are none.

b. Appellant's brief, only, must have a preliminary statement of the grounds for the jurisdiction both of the court or agency appealed from and of this court. The statement must cite to supporting statutes and record dates which show that the appellant timely filed the notice of appeal or the petition for review.

c. A statement of the issues presented for review. (This may be omitted in appellee's brief if appellee is satisfied with appellant's statement; if not satisfied, appellee should simply correct errors or omissions in appellant's statement.)

d. A statement of the case, which must first briefly indicate the nature of the case, the course of proceedings, and the determinations of the court below.

e. A statement of the facts relevant to the issues presented for review, with appropriate references to the record. References to documents in the record must include the document number, if any, from the district or agency docket sheet, document name, filing date, and page number within the document (*e.g.*, Doc. No. 48, Motion for Summary Judgment filed 1/15/88 at 3). Transcript

references must be to page number, or if not sequentially paginated, by date of proceeding and page number (*e.g.*, Trans. of 8/15/88 Suppression Hearing at 37). If transcripts are not sequentially paginated, references must be to volume or date of proceedings and page number (e.g., Tr. Vol. VII at 37 or Tr. 8/31/88 at 37). Copies of all trial exhibits which are referred to in the brief that were returned to the parties by the district court must be included in a separate addendum. A single addendum is required. At the option of the party, the exhibits may be included in both copies of the appendix. 10th Cir. R. 10.3(D)(5).

f. A summary of the argument. The argument must be preceded by a summary of it.

g. The argument, which must contain the contentions of the party with respect to the issues presented and the reasons for them. It also must include citations to relevant authorities, statutes, and portions of the record. Preceding the discussion of each issue, there must be a statement of the standard of review applicable in this court and a precise reference to the place in the record where the issue was raised and decided. *See* 1 S. Childress & M. Davis, *Standards of Review*, § 1.1 at 4 (1986), S. Childress, *A Standards of Review Primer*, 125 F.R.D. 319 (1989). If the issue is failure to admit or exclude evidence, refusal to give a particular jury instruction, or any other ruling for which a party must record an objection to preserve the right of appeal, the brief must identify where in the record counsel made the objection and where it was ruled upon.

h. A short conclusion, setting forth the precise relief sought.

i. On the front cover, a statement whether oral argument is desired. A statement of the negative is required when no oral argument is desired. If oral argument is requested, an explanation of the reason oral argument is necessary

must follow the conclusion.

j. In appellant's brief only, an attachment containing a copy of the judgment or order to be reviewed, any pertinent written findings, conclusions, opinions or orders, or, if oral, transcripts of them. If consideration of the appeal requires study of statutes, rules, regulations, contracts (or relevant parts of them), copies of those documents must also be placed in the attachment to the brief. If the district court's ruling was premised on adoption of a magistrate judge's report and recommendation, both must be included.

k. Every brief that relies on the type-volume limitation must contain a certificate of compliance. Fed. R. App. P. 32(a)(7)(C). *See Length and Form,* below.

NOTE - Even though the pertinent orders or judgment may be included in appellant's appendix, copies must also be attached within each copy of appellant's brief.

2. *Additional Briefs*. The only additional brief that may be filed without court permission is the reply brief. Appellant may file a reply brief in response to appellee's brief. Cross-appellant may file a reply brief in response to the answer brief filed by the cross-appellee.

NOTE - Additional authorities which are published after a brief is submitted may be brought to the attention of the court by a letter containing citations to the supplemental authorities. Fed. R. App. P. 28(j). The letter must not contain argument but direct the court's attention to the page of the brief or a point argued orally.

3. *Cross-Appeals*. If there is a cross-appeal, the appellee's answer brief must contain the issues and arguments on cross-appeal as well as the answer to appellant's opening brief. 10th Cir. R. 31.2. Appellant's reply brief must include the answer on the cross-appeal and may be up to 30 pages or comply with the type-volume limit like other principal briefs. Appellee may file a final reply brief of 15 pages or one half the type-volume limitation.

4. *Designation of Parties*. The Federal Rules of Appellate Procedure specify that designations such as "appellant" and "appellee" should be used as little as possible. In the interest of clarity, the briefs should, as much as possible, use the designations used in the court or agency below, the actual names of the parties, or terms that describe the parties.

5. *Joint Briefing*. Joint briefing is encouraged, but not required, in criminal appeals involving more than one appellant or appellee. 10th Cir. R. 31.3. The United States is encouraged to file a consolidated brief whenever possible. 10th Cir. R. 31.2. A motion to file a consolidated brief can be granted even if the appeals are not consolidated. Every effort is made to set co-defendants' appeals before the same panel.

Joint briefing is required to the greatest extent possible in civil appeals involving more than one appellant or appellee. Any separately filed brief must contain a certificate of counsel stating why a separate brief is necessary. 10th Cir. R. 31.3(B).

6. *Amicus Briefs*. Amicus briefs may be filed with the written consent of all parties (the consent must be filed with the brief), if the court grants a motion for permission to file one, or at the request of the court. Consent or permission to file is not required for amicus briefs of the United States, an agency or officer of the United States, or by a State or Territory. Fed. R. App. P. 29.

B. *Length and Form*

1. *Word Limitations*. Principal briefs may not exceed 30 pages in length, exclusive of the table of contents, tables of citations, and attachments and reply briefs may not exceed 15 pages unless they comply with the type-volume limitations in Fed. R. App. P. 32(a)(7)(B) and (C). Amicus briefs are limited to one half the length of a principal brief. Fed. R. App. P. 29(d). Motions for permission to exceed these lengths must be filed at least 10 days before the due date of the brief. If counsel believe they need more pages they should give the court explicit reasons. The court will increase brief lengths only in extraordinary and compelling circumstances. 10th Cir. R. 28.3.

2. *Covers, Page Size, Type Style and Spacing*. The court prefers 14-point type as required by Fed. R. App. P. 32(a)(5)(A), but 13-point type is acceptable. The page and type-volume limitations of Fed. R. App. P. 32 must be closely followed. Different word processors may yield different word counts. The court is not interested in refereeing disputes about brief limits. The judges uniformly prefer a shorter, well edited brief to one that pushes the limits. If the preparer of the certificate of compliance required by Fed. R. App. P. 32(a)(7)(C) does not rely on a word processor count, every five characters (including numerals) counts as a word. All the characters in citation sentences and footnotes must be counted.

3. *Form of Citation*. While no formal requirements are imposed, the court strongly recommends that the parties cite statutes, cases and other materials according to a uniform system, such as that set out in the *Bluebook: A Uniform System of Citation*. References to the record should follow 10th Cir. R. 28.1.

4. *Addendum*. Copies of trial exhibits referred to in a brief must be included in an addendum separate from, but filed with, the brief. The addendum must have a cover page in the same form as the cover page on the briefs and must have a table of contents. The addendum must be paginated, and copies of trial exhibits

included in the addendum must be referred to by name and page number. Only one copy of the addendum must be filed. A party may include trial exhibits in all copies of the appendix, instead.

C. *Other Writing Suggestions*

The court is duty-bound to do substantial justice in deciding the appeals before it. Judges, however, must necessarily rely upon the advocates to point out the facts of record, the applicable rules of law, and the equities of the particular case that compel a just decision. An effective and carefully prepared brief and argument is more likely to be successful at persuading the court to decide in one's favor than a perfunctory presentation.

In writing the brief, bear in mind that briefs are the first step in persuasion, because the Tenth Circuit judges read briefs in advance of oral argument. If the case is designated for submission without oral argument, the brief may be the party's only argument. In any event, the briefs should be written in such a fashion that the attorney can forego oral argument without foregoing any important contention.

We add the following additional suggestions for the brief writer:

1. Make the statement of the nature of the case, how the case got to the court, the basis of the court's jurisdiction, and what the court below did, succinct. This is also a good place to orient the court to the justice of the party's position by a terse preliminary indication of what was wrong below or why the lower court was right.

2. The statement of the issues or questions presented for review requires careful selection and choice of language. The main issue should be stressed and an effort made to present no more than a few questions. The questions selected should be stated clearly and simply. A brief that assigns a dozen errors and treats

each as being of equal importance when some are clear losers, creates a feeling in the judges that none of the arguments are very good. As Justice Frankfurter once said, a bad argument is like the clock striking thirteen, it puts in doubt the others.

3. The statement of facts should set forth a concise and objective account of the pertinent facts, with references to the record to support and facilitate verification of each important statement. The statement of facts generally should be a narrative chronological summary, rather than a digest of what each witness said. Relevant unfavorable facts should not be omitted or slighted. The judges consider this factual statement to be a most important part of the brief. If the facts are well marshaled and stated, the relevant and governing points of law often will develop naturally. An effective statement summarizes the facts so that the reader is persuaded that both justice and precedent require a decision for the advocate's client. While the rules provide that appellees need not make any statement of the case, they should give their own statement if they believe the relevant facts have not been fairly presented by the appellants; but they should **not** make needless repetition of the appellant's statement.

A long factual statement should be suitably divided by appropriate headings. Nothing is more discouraging to the judicial eye than a great expanse of print with no guideposts and little paragraphing. Short paragraphs with topic sentences and frequent headings and subheadings assure that the court will follow and understand the points being made.

4. The argument should be suitably broken up into the main points with appropriate headings. The arguments should contain the reasons in support of counsel's position, including an argumentative analysis of the evidence, if called for, and discussion of the authorities. If the case turns on the facts, the brief should make clear factual arguments bolstered by record references. If the important record reference is short enough, quote the record, but not for pages and

pages. Record citations also help the court find the important facts in a voluminous record.

When possible the emphasis should be on reason, not merely on precedent, unless a particular decision is controlling. A few good cases in point, with sufficient discussion to show that they are relevant, are much preferred over a flurry of string citations. Quotations should be used sparingly. If a case is worth citing, it usually has a quote which will drive the point home, and one or two good cases are ordinarily sufficient. If the cited case lacks a good quote, a terse summary will establish it as a case the court should read. A long discussion of the facts of the cited cases is usually unnecessary, except when a precedent is so closely on point that it must be distinguished if the party is to prevail.

Parties should distinguish or state why this court should not follow the opponent's leading authorities. Almost always the court will find the leading cases against a party's position. If those cases are not in the trial court's opinion, they likely will be in briefs filed in the trial court and will be cited again on appeal. Parties must remember also that the judge who writes the decision will research and find any relevant cases which the briefs did not discuss. The judge has a staff of talented law clerks and access to Westlaw® and Lexis® for computerized research. Briefs need not distinguish an opponent's cases which obviously do not apply. Lawyers should ask themselves whether the judge could reasonably think the opponent's cited case was important. If not, do not waste space on the case. Treat only those which could trouble the court.

When appropriate, brief writers should argue policy, stressing why the court should adopt the client's view. This is particularly important when there is no controlling precedent – when the court's opinion will fill a gap or resolve an ambiguity in a statute. Legislative history, the intent of the legislature, and sound public policy are very important to argue.

5. While the brief should be written with attention to style and interest, clarity and simplicity are the paramount considerations. Italics and footnotes should be used sparingly. Above all, accuracy is imperative in statements, references to the record, citations, and quotations. Counsel should carefully proofread briefs for errors in spelling, quotations, or citations. The neater the briefs appear, the better written, the more succinct, the more to the point they are, the better the impression the briefs make on the judges.

6. Finally, brief writers should put themselves in the judges' position – what will the judges see as critical? Write the briefs almost as the opinion the client would like to see the court write. The appellate courts have constraints under the law: for instance, they cannot substitute their opinion when there are credibility questions. Think about what the judges must do to affirm or reverse, and structure the briefs accordingly.

D. *Sample Brief*

To further assist practitioners, there is a sample brief at Appendix A.

E. *Opening Brief Checklist*

OPENING BRIEF CHECKLIST		
1.	Cover page including statement as to whether or not oral argument is requested.	√
2.	Table of contents.	√
3.	Table of cases with statement of prior or related appeals appended.	√
4.	Statement of grounds for jurisdiction, including dates showing timely filing notice of appeal or petition and citation supporting jurisdiction.	√
5.	Statement of issues.	√
6.	Statement of case.	√
7.	Statement of facts.	√
8.	Argument, including summary of argument, statement of standard of review, and precise reference to decision being appealed.	√
9.	Conclusion, including the reasons oral argument is necessary if so requested.	√
10.	Attachments of decision being reviewed and relevant portions of statutes, rules, regulations or contracts if determination requires.	√
11.	Signature by counsel appearing in appeal and properly admitted to bar.	√
12.	Certificate of compliance with type-volume limits.	√
13.	Certificate of service.	

VII. FILING AND SERVING BRIEFS

The Federal Rules of Appellate Procedure describe filing and service of briefs. This court has adopted important changes with respect to filing time and numbers of copies. 10th Cir. R. 31.1 through 31.6.

A. *Time for Filing*

1. *Appellant's Opening Brief in Appeals from District Courts*

a. *Cases with Appointed Counsel or Pro Se Cases*

In appeals from district courts where appellant's counsel is appointed or counsel for a co-defendant is appointed or where appellant is pro se, appellant's opening brief is due within 40 days after the date the record is filed in the court of appeals.

b. *Cases with Retained Counsel*

In cases where all parties are represented by retained counsel, appellant's opening brief must be filed within 40 days of the date on which the district court clerk notifies the court of appeals that the record is complete for purposes of appeal.

2. *Tax Court Appeals and Agency Review Proceedings.* In an appeal from the United States Tax Court, appellant's brief is due 40 days after the record is filed. Fed. R. App. P. 31(a)(1). In cases asking for review or enforcement of agency orders, petitioner's brief is due 40 days after the record or certified list is filed. 10th Cir. R. 31.1(B).

3. *Answer Briefs*. In every case, the answer brief of the appellee/respondent is due 30 days after service of the opening brief of the appellant/petitioner. Fed. R. App. P. 31(a)(1).

4. *Reply Briefs*. The filing of a reply brief is optional. If, however, the

appellant/petitioner elects to file a reply brief, it must be filed within 14 days after service of the answer brief of the appellee/respondent. Fed. R. App. P. 31(a)(1).

5. *Cross-Appeals*. In situations involving cross-appeals, the party deemed the appellant under Fed. R. App. P. 28(h) must file an opening brief in accordance with 10th Cir. R. 31.1.1(A) or (B). Appellee's answer brief must also contain the issues and argument involved on cross-appeal. Appellant's reply brief, which must also include answers to issues raised by the cross-appeal, is considered an additional answer brief and, therefore, is due within 30 days after service of appellee's answer brief. If appellee/cross-appellant elects to file a reply brief on the cross-appeal issues, it must be filed within 14 days after service of appellant's reply brief. The order in which briefs are filed may be varied by court order on motion of a party or by the court.

B. *Calculation of Time*

As with other papers required or permitted to be filed in the court, the filing party must serve the brief on all other parties to the appeal or review proceeding. Fed. R. App. P. 25 and 31(b). Unlike other papers, however, briefs, if filed by mail, are timely filed on the day of mailing if the most expeditious form of delivery by mail (exclusive of special delivery or express mail) is utilized. Fed. R. App. P. 25(a). Delivery to a third-party commercial carrier for delivery to the clerk within three days is also timely filing. If the opening brief is filed by mail or third-party commercial carrier, three days are added to the service date found in the certificate of service of that brief to calculate the times for filing the answer brief.

C. *Extensions of Time*

Litigants owe an ethical obligation to avoid delay. The court disfavors motions

for extensions of time to file briefs. 10th Cir. R. 27.4(A) and 31.4. Motions for extensions of time must comply with 10th Cir. R. 27.4. *See also* Section XIV, Motions.

D. *Copies to be Filed and Served*

An original and seven copies of briefs must be filed. Two copies must be served on each party separately represented. 10th Cir. R. 31.5 and Fed. R. App. P. 31(b). Carbon copies will not be accepted. Indigent pro se litigants may file an original and three copies, and must serve one copy on counsel for each party separately represented.

VIII. ORAL ARGUMENT

A. *Panel Arguments and Panel Composition*

The court hears oral argument during regularly scheduled sessions of court which take place in January, March, May, September, and November. The court is always in session to hear writs and motions, and it hears argument or considers cases submitted on the briefs at special sessions any time the calendar may require. Those requiring emergency relief may contact the clerk at any time, day or night.

Oral arguments generally commence at 8:30 or 9:00 a.m. and continue without interruption, except for change of counsel between cases, until the entire calendar is heard. Some panels will take a brief recess midway through the calendar. The courtrooms are on the first and second floors of the courthouse in Denver. Counsel must check in with the clerk's office on the first floor one-half hour before argument begins in the first case on the calendar.

Unless it is hearing a case en banc, the court sits in panels of three judges, except that two-judge panels dispose of certain routine calendar and special writ matters. Assignments to hearing panels are made randomly under the clerk's supervision. Briefs are made available to judges soon after the cases are assigned to hearing panels, usually several weeks before scheduled argument. The panel judges read the briefs before oral argument. Fifteen minutes generally is given to each side for oral argument. Any extension of argument must be obtained from the court in advance of oral argument, and will be granted only in especially complicated cases. Oral argument is a mix of prepared remarks and responses to questions from the bench. Attorneys may obtain the identity of the members of the panel hearing a case at any time within seven days of oral argument by calling the clerk's office, (303) 844-3157, after hours or if the automated attendant

answers, press 6.

Orally argued cases are assigned for opinion after the hearing. The length of time until a decision is entered depends upon the workload of the judge and the difficulty of the case. The court has only recently obtained its full complement of judges. It has instituted extraordinary measures to catch up with the large volume of appeals. An increasing number of cases are decided on the briefs without oral argument. In the year ended June 30, 2002, 70% of cases terminated on the merits were submitted on the briefs. These cases receive the same full review by the judges on the panel and are submitted on the briefs only because the issues presented would not have been clarified by oral argument.

In addition to the hearing panels, the court has a number of standing committees and rotating or standing panels to consider motions, emergency matters, and any other items requiring immediate attention or not involving oral argument.

B. *Calendaring*

All cases are screened for jurisdictional defects. When a jurisdictional defect is suspected, the court orders a brief on the issue. If it is determined that the court lacks jurisdiction, the proceeding is dismissed.

When the briefs are filed and cases are at issue, they are submitted to a judge for screening. Each judge is a member of a three-judge screening panel and may send the case to the clerk to calendar for oral argument, assign the case to the non-oral argument calendar, or propose disposition of the case to the screening panel. If any judge on the screening panel or a nonargument panel believes oral argument would be helpful, the case is set for oral argument.

In the year ended June 30, 2002, 2,629 appeals were filed. In that same period, 1,469 were terminated after hearing or submission. Of those, 434 were orally

argued.

For orally argued cases, the length of time between filing of briefs and oral argument will vary depending upon the type of case and the size of the court's backlog. Criminal and other special cases receive priority. Due to extraordinary effort in recent years, the court is now current. The median time from filing appellee's brief until oral argument is 3.5 months. This is a median; half the cases take longer.

C. *Time and Attendance*

1. *Time for Argument*. In orally argued cases, each side receives fifteen minutes, which includes time needed to answer the court's questions. In extraordinary cases, like death penalty cases, additional time may be allowed if a party submits a motion prior to the date of the argument. The length of time permitted for oral argument has no relationship to the amount of attention which the court gives a particular case. Limitations on oral argument merely represent the court's estimate of the time needed to present the issues, considering that the panel will have read the briefs before oral argument.

Appeals consolidated for briefing purposes will be treated as one case for oral argument unless the court orders otherwise. Counsel may divide the argument time as they agree, although some limitations are built in by the short time allowed for oral argument. The court does not favor divided arguments on behalf of a single party or multiple parties with the same interests. 10th Cir. R. 34.1(B).

2. *Attendance of Counsel*. Counsel for each party must be present for oral argument unless excused by the court for good cause shown. Parties desiring to waive oral argument and submit on the briefs must file a motion at least 10 days before the scheduled argument or they may be held liable for the expenses incurred by parties prejudiced by the delay. 10th Cir. R. 34.1(A)(4).

3. *Postponement.* The court will not grant motions to postpone oral argument except in extraordinary circumstances. The court will deny any motion to postpone which is filed within two weeks of the oral argument, except in the case of a genuine emergency.

D. *Preparation and Presentation*

1. *Preparation for Argument.* Counsel preparing to argue the appeal should study the case afresh even though he or she worked on the brief and tried the case below. The attorney who tried the case may not be the best person to analyze the case for appeal. Only counsel who take the time to familiarize themselves thoroughly with the record will do justice to the oral argument.

Appellant's oral argument must capture the judges' interest and seek to persuade them that an injustice has been done which can be corrected in accordance with governing statutes and established precedents. Appellee, on the other hand, must convince the judges that the issues have been correctly and fairly handled by the court below or that, in any event, the ultimate determination below requires no alteration.

Although the oral argument and brief complement each other, each serves a different purpose. Oral argument should emphasize the critical points so as to persuade the judges that fair play and precedent support the position of the advocate. In contrast, the strength of the brief lies in its lucid, precise, and documented statement of the facts, with fully explained reasoning and law in support of counsel's position. The brief should detail how the court may arrive at the decision which the advocate is attempting to persuade the court is correct.

Before arriving in court for the argument, counsel should review the case thoroughly. The entire record below should be read and reread, even though counsel may have done so previously when preparing the brief. The briefs from

both sides also should be reviewed carefully. Counsel should be aware of discrepancies in the two sides' statements of the facts and the case; and counsel should be fully conversant on the legal arguments at issue in the case. Finally, throughout the reviewing process counsel should imagine themselves in the court's position and think about what the judges will want to know and the order in which they will want to hear it.

On the day of the argument, the attorneys who will argue must check in with the clerk. In Denver, attorneys check in at the clerk's counter in the middle of the first floor of the Byron White Courthouse. Those who will present arguments must be in the courtroom for roll call and announcements fifteen minutes before the first argument of the day is scheduled to begin. Counsel must be present when the panel takes the bench. Ordinarily the presiding judge will excuse counsel in the second and subsequent cases from remaining in the courtroom for the other arguments. However, counsel must monitor the cases that precede theirs so they are available to begin their argument when the previous argument finishes.

Counsel should become familiar with the court by listening to other earlier scheduled arguments. Counsel should know the names of the judges. Counsel should identify themselves to the court, even though their names appear on the court's daily calendar sheet, so that the judges know who is arguing and can address counsel by name. When addressing the judge during oral argument, it is appropriate to address him or her as "Your Honor" or "judge." A common mistake is to refer to a circuit judge as "justice" but that term is typically appropriate only to the judge sitting on the highest court of a particular court system – typically a justice of the United States or a state Supreme Court.

2. *Presentation of Oral Argument*. Experience shows that the following guidelines should be observed in arguing an appeal:

a. *The opening statement*. The panel will have read the briefs before

argument and thus will be familiar with the case. Individual judges, however, will have prepared to hear as many as thirty cases during the week in which oral argument is set. Thus, counsel should say enough about the facts and posture of the case to bring the particular appeal into focus. Beyond that, an effective presentation can take many forms. Obviously, counsel must catch and hold the judges' attention in the first few minutes. The appellant in particular should identify the critical issues on appeal immediately, and then should move quickly to a lucid, concise and persuasive argument.

b. *The statement of facts*. Counsel should attune themselves to the court's level of comprehension. If the facts are relatively simple, counsel need not spend much time on them. A common mistake lawyers make before this court is to spend half of their oral argument talking about background facts, not the key ones on which the decision turns. If the case is complex factually, however, even though the court has read the briefs, counsel may need to give a clear version of the facts – indeed, a clear factual exposition may be the most appropriate appellate argument an attorney can make.

c. *The argument*

(i) *The applicable law*. Counsel should rely principally upon the briefs for the full discussion of the law which supports the appeal. In oral argument, counsel should avoid a minute dissection of case law except when one or a few cases clearly should control the outcome or when cases must be distinguished in order to prevail. Quotations from cases should be avoided and the advocate should not give the citations of cases mentioned in oral argument. Just say, for example, "Your Honor, *Johnson v. Jones*, from this Circuit, cited in the brief, is controlling. It says in essence the following. . . ." If counsel intends to mention cases not cited in

the brief, he should refer to such cases by name and court, providing the citations in writing to the court and counsel before argument.

NOTE - Visual aids are not always helpful. However, a panel may grant permission to use visual aids. The application to the panel must state whether or where in the record the aid appears and the position of opposing counsel regarding its use at argument.

(ii) *Emphasis*. With the time limits this court imposes, counsel must emphasize the important points in oral argument (but not to the point of giving the panel the impression that the others are pure throwaways). By the time the case gets to our level, counsel should know what is critical – he or she should have an instinct for the case's strongest point and the opponent's weaknesses. Stress those in oral argument.

Try not to read the argument. Famous advocate John W. Davis said, "Read sparingly and only from necessity." An advocate cannot hold the audience long without looking it in the face. Counsel needs to know the argument so well that he or she can watch the court, respond to its uncertainties, ascertain the direction of its concern, respond, and maintain a disciplined earnestness.

(iii) *Answering questions – flexibility*. An important part of oral argument is to answer the court's questions. Counsel should answer questions as directly and categorically as possible. Answer questions at the time they are asked; do not postpone an answer until later in the argument.

Counsel should aim for controlled flexibility, a relaxed resilience

that enables a response to a judge's question and yet permits return gracefully to the counsel's charted course. This is a real art of advocacy. Often a question goes to the heart of what the judge thinks is the decisive issue. Counsel must listen to the judge and respond in a way which disabuses the panel of any misapprehension of the advocate's position. One great advocate says to rejoice when the court asks questions. Not only does it show the panel is awake, but a question enables the advocate to penetrate the mind of the court. Yet, of course, counsel must not let the court keep counsel from reaching the major points that must be made. Oral argument should be spent treating the main issues that counsel relies upon, and counsel must get to those.

(iv) *Talk policy sense*. Counsel should prepare by asking themselves policy questions about the case. Perhaps there is no room for policy in the case, but if there is, counsel should be able to tell the court why his or her client should prevail and what social ends would be promoted thereby.

The best advocates somehow exude an aura of conviction, radiating a sense of belief in their client's case without making every point a life and death issue. As Judge Frank Coffin has said, "This is an ineffable quality. I know it when I see it but I cannot articulate a formula. Without it the most eloquent speaker falls a bit flat. With it attorneys may bumble, stammer, even read their argument and yet be effective because they have this ability to say to the Court, 'Look, I mean business. This case is important not just to my client but to the development of law. You judges had better do the right thing.' "

One benefit of oral argument may be the opportunity to stress the narrowness of the issue before the court. A party may want to win as big or lose as small as possible. For example, it is sometimes critical to a regulated industry that a decision be a narrow one confined to the special facts of the case rather than one announcing a broad new rule. Or, if a conviction might be set aside, the prosecutor hopes to create as little precedent as possible. A good advocate looking to the future may try to persuade the court to resist expressing dicta or, conversely, may actively seek the enunciation of a broad rule.

(v) *Avoid personalities.* Although counsel may, of course, criticize the reasoning of opposing counsel or the court below, **counsel should be careful not to make personal attacks**. Disparaging words will only detract from, and will not advance, counsel's argument.

d. *The special position of appellee's counsel.* Appellee's counsel has the advantage of listening to appellant's argument. Appellee's counsel should correct appellant's counsel's important misstatements of the facts. Appellee's counsel probably should give fresh answers to questions which were posed to appellant's lawyer. This can be done by simply noting the question and saying the appellee would like to respond also. Appellee's counsel can then develop other points, and note concessions by the opponent. Appellee's counsel should often be able to ascertain from the court's questions the factors upon which the case will turn. Of course, having won below is a great advantage, especially if the issues turn on disputed facts involving credibility determinations.

e. *Rebuttal.* It is considered good practice for appellant to reserve a few minutes of the allotted time for rebuttal. The last word may be important. It is

the court's experience, however, that statements on rebuttal seldom make points that the judges do not already have in mind. Rebuttal often can be bypassed if there is nothing fresh to be said. Do not confuse the necessity of raising fresh points on arguments already before the court with the introduction of new arguments, which are not permitted on rebuttal. If on rebuttal counsel attempts a surprise new argument, the court almost surely will either deny consideration or give appellee a chance at surrebuttal. Rebuttal should be short, to correct important errors and mischaracterizations by appellee's counsel. When counsel has concluded argument, he or she should sit down regardless of whether the allocated time has been exhausted.

f. *Be succinct.* The court too often sees a lawyer who makes all possible points, then notes that all argument time has not been used up, so starts to go over the points again. The court is grateful when counsel make their arguments and then sit down. That a certain amount of time has been allocated for oral argument does not constitute a contract to fill each minute.

E. *Video Conference*

The court has experimented with and may continue to use televideo technology to hear oral arguments. The potential savings to the government of letting counsel whose travel would be paid by the United States argue cases without leaving their home towns is immense. While the experience is not quite the same as being in the room with the panel judges, it is very close.

If your case is selected for videoconferenced arguments, the clerk will notify you when and where to appear for argument. Generally, you will report to the clerk's office for the U.S. District Court in your district, or in some cases another district within your state. Reporting times will be adjusted to your local time. For example, if court is scheduled to convene at the Byron White U.S. Courthouse,

Denver, Colorado at 9:00 a.m. Denver time (10:00 a.m. Central time) and you are arguing by videoconference from Oklahoma City, you will be directed to report to the district court clerk's office no later than 9:30 a.m. local time. The district court clerk will direct you to the place where the videoconference equipment is installed.

A court representative will greet you, provide further information and answer questions. You will see some things which are familiar to you, including a podium with a microphone for presenting arguments; however, you will also see a television monitor and video camera some 10 to 15 feet in front of and facing the podium. When arguments are being videoconferenced , attorneys can see the panel judges on the monitor and hear them through connected speakers. With similar equipment installed in our Denver courtroom, the panel judges can see and hear the arguing attorneys.

During your argument, you may detect a very slight delay between the time words are spoken and the time they are heard at the remote conference site. This could cause you to continue speaking, and so miss the first word or two of a question posed by a panel judge. The court is exploring enhanced technology which will eliminate this transmission delay. In the meantime, the problem can be minimized by some simple protocols. Judges will preface their questions by a warning remark, such as "counsel, I have a question," whereupon you should immediately stop speaking and listen for the question. That way you will hear the entire question and be able to formulate your response.

Here are some other tips that may help you in presenting your argument by interactive videoconference:

- *Act Natural.* The panel judges will be able to see and hear you just as if you were presenting your argument in person.

• *Make Eye Contact.* Since the camera is located on top of the monitor, by looking at the judges on the monitor, you will make eye contact with them.

• *Use Your Normal Voice.* The podium microphone and system speakers will pick up and transmit your voice as clearly as if you were arguing to the judges in person. There is no need to speak louder or slower than you would in a normal courtroom setting.

• *Avoid Exaggerated and Unnecessary Gestures or Movement.* Remain standing behind the podium. If you move away from the podium, you may be out of camera range and not visible to the panel judges. While normal gesturing can enhance your videoconferenced argument, extreme or exaggerated hand and arm movements can be even more distracting than when arguments are presented in person.

• *Dress Conservatively.* Remember you're a TV star. Just as on television, some colors are better than others (whenever practicable avoid white or vivid colors) and bold patterns may cause a strobe effect.

• *Avoid Unnecessary Noise.* Noise such as caused by tapping on the podium or shuffling papers may be transmitted through the system to the panel judges, thereby making it difficult for them to hear or concentrate on your argument.

IX. DECISION – MANDATE – COSTS

A. *Deciding the Appeal*

Nearly always, the court reserves judgment at the conclusion of oral argument. The judges confer promptly after completion of a day's calendar of oral arguments. Although the panel may reach a tentative decision at this conference, additional exchanges among the judges are often necessary. If the presiding judge of the panel is in the tentative majority, that judge assigns the case to a panel member to prepare an opinion or order and judgment. A copy of a proposed opinion is circulated by the authoring judge, not only to the other members of the panel but to the whole court. After members of the panel have concurred or had an opportunity to prepare separate opinions, the disposition is filed with, and immediately released by, the clerk. A copy of the final opinion or order and judgment is mailed to all parties on the day it is entered on the docket.

The court need not write an extensive disposition in every appeal but may, in its discretion, use a terse judgment such as the one word "affirmed." 10th Cir. R. 36.1. Nevertheless, nearly all final dispositions of an appeal are in one of two forms: a published "opinion" or a not-for-publication "order and judgment." All opinions are published in the West's Federal Reporter and are made available to the unofficial reporters that serve practitioners in specialized areas of the law. Published opinions may be authored by a particular judge or may be issued per curiam.

All opinions and orders and judgments are available electronically through Lexis® and Westlaw®. They are available on PACER (Public Access to Court Electronic Records) at http://pacer.ca10.uscourts.gov, the evening of the day they are filed. There is a fee for PACER service. To register as a user, call the San Antonio billing center at (800) 676-6856. PACER is available around the clock seven days a week. (Dockets are also available on PACER.) The court's opinions are hosted on

the Internet by Washburn University School of Law Library. URL to http://www.kscourts.org/ca10/. The court's web page may be found at http://www.ck10.uscourts.gov. Access to the court's opinions on PACER (Public Access to Court Electronic Records) is at http://pacer.ca10.uscourts.gov.

More and more federal court information is available on the world wide web. Most courts have web pages, where docket information is available. Docket sheets and sometimes copies of documents can be downloaded.

Unpublished orders and judgments of the circuit court have no precedential value and do not bind other panels of the court. However, they may be cited if they have persuasive value with respect to a material issue that has not been addressed in a published opinion and the unpublished disposition would assist the court. 10th Cir. R. 36.3. A copy of the unpublished disposition must be provided with the document in which it is cited. Orders and judgments show the names of the judges who constituted the panel. They generally show an "entering" judge who took special responsibility for the drafting, but they may be issued per curiam. Interim orders not constituting a final disposition on the merits of the appeal may be entered under the name of the chief judge, one or more other judges, or by the clerk. There is no requirement that any order or opinion of this court be signed, either by a judge or the clerk. When the disposition is by opinion, the judgment is prepared separately and signed and entered by the clerk. It repeats the judgment directed by the court in the opinion. The judgment is sent to the district court when the mandate issues and is a signal that jurisdiction in the court of appeals has ended. *See Mandate*, below. When the disposition is by order and judgment, it is the judgment that is entered by the clerk and no separate judgment is prepared.

When an opinion appealed from has been published by a district court, an administrative agency, or the United States Tax Court, this court will ordinarily dispose of the appeal by a published opinion. However, if the disposition is by order

and judgment, the court will designate for Federal Reporter Third Series (F.3d) publication a statement indicating that the opinion below was affirmed, reversed, or disposed of in some other manner.

B. *Mandate*

1. *Issuance.* Judgments of the court take effect when the mandate issues. The mandate of the court of appeals is issued 7 calendar days after the time for filing a petition for rehearing has passed, unless a timely petition for rehearing is filed or an explicit court order shortens or lengthens the time. If a petition for rehearing is denied, the mandate is issued 7 calendar days after denial unless the court shortens or extends the time. On occasion, the court will issue the mandate forthwith, in which case the mandate is issued at the same time as the judgment is entered. When this court affirms criminal convictions, bail usually will be revoked at the time the mandate issues but may be revoked sooner. A certified copy of the final judgment, a copy of the opinion of the court, and directions as to costs, if any, constitute the mandate.

2. *Stay Pending Application for Certiorari.* A stay of mandate pending application to the Supreme Court for a writ of certiorari may be sought upon motion, with reasonable notice to all parties. Fed. R. App. P. 41(d)(2). Currently, the stay may not exceed 30 days unless extended by the court for good cause shown. To prevent a stay from being used for purposes of delay, the Tenth Circuit will not grant a stay pending certiorari unless it concludes that there is a reasonable chance that certiorari may be granted. Even after the mandate of the court of appeals has been issued the parties retain the right to apply for a writ of certiorari. Issuance of the mandate does not affect the power of the Supreme Court to grant the writ.

3. *Petition for Writ of Certiorari.* A party has 90 days from the date of entry of judgment or the date of the denial of a timely petition for rehearing to file

a petition for writ of certiorari in the United States Supreme Court. The court of appeals has no authority to extend the deadline.

C. *Costs*

The items that may be recovered as costs by a prevailing party in an appeal are limited to those set out in Fed. R. App. P. 39 and 10th Cir. R. 39. An itemized and verified bill of costs, along with proof of service on opposing counsel, must be filed with the clerk within 14 days after entry of the judgment. The verification of the bill of costs may be by a party or by counsel, and it should be accompanied by an itemized statement of charges sufficient to determine whether the item is taxable and whether it is within the limit for copy fees. Objections must be filed within 10 days of service on the party against whom the costs are to be taxed, unless the time is extended by the court. Usually the only reasons for objecting would be that the cost bill includes unreasonable charges or improper items.

Although "taxable" in the court of appeals, the money involved as "costs" never physically changes hands at the court of appeals level. The circuit clerk prepares an order or an itemized statement of costs for insertion in the mandate. The costs then may be recovered in the district court after issuance of the mandate with its statement of costs. In some instances the clerk may send a supplemental statement of costs to the district court for inclusion in the mandate after the mandate has issued. No time limit is specified for the court of appeals to send the statement of costs, and district courts are not authorized to impose such a time limit.

X. PETITIONS FOR REHEARING – EN BANC PROCEDURE

A. *Petitions for Rehearing*

1. *Time for Filing*. A party may file a petition for rehearing within 14 days after entry of the judgment. The time is enlarged to 45 days in **civil** cases in which the United States or an agency or officer of the United States is a party. These time periods may be shortened by the court but may not be extended except for good cause shown.

2. *Form and Disposition*. A petition for rehearing must be concise and must clearly identify the points of law or fact the petitioner believes the court has overlooked or misconstrued. An original and three copies of the petition must be filed; the petition is limited to fifteen pages. Fed. R. App. P. 40(b). If the petition does not request en banc consideration, it is circulated only to the panel of judges that decided the appeal, who then vote on the petition. A majority, of course, rules. There is no oral argument in conjunction with a petition for rehearing unless ordered by the court. No answer to a petition for rehearing is permitted unless requested by the court. If the court desires a response by a nonpetitioning party, the clerk will so advise counsel by order. In the relatively rare instance in which a petition for rehearing is granted, the court in its discretion may either call for argument or make a final disposition without argument.

Petitions for rehearing should never assume an adversarial posture with the panel. Challenging the position of an opponent in an argumentative way is an effective adversarial tool, but it may become counter-productive when applied to the panel opinion. Even though the court has ruled against a particular party, the panel has not become an adversary or an opponent, and counsel should not treat it as such in the petition for rehearing.

3. *Frivolous Petitions – Sanctions.* Although petitions for rehearing are

filed in a great many cases, they rarely are granted. Rehearing will be granted only if a significant issue has been overlooked or misconstrued by the court. If the court finds that a petition for rehearing is wholly without merit or filed for delay, the court may tax a sum of up to $500.00, and may require counsel personally to pay the amount taxed to the opposing party. 10th Cir. R. 40.1(B).

4. *Petitions for Rehearing not Prerequisite to Certiorari.* The filing of a petition for rehearing is not a prerequisite to filing a petition for a writ of certiorari in the United States Supreme Court. The time for seeking certiorari in the Supreme Court, however, is tolled until the disposition of a timely filed petition for rehearing in the court of appeals.

B. *En banc Procedure*

1. *Petitions for Rehearing En Banc.* A petition for rehearing may request consideration by the whole court sitting en banc. En banc consideration is often requested but seldom granted. Ordinarily the court will grant en banc review only when necessary to secure or maintain uniformity of the circuit's decisions, to comply with a U.S. Supreme Court ruling in conflict, or to consider an issue of exceptional importance. 10th Cir. R. 35.1.

2. *Filing Requirements.* Petitions for initial hearing en banc or rehearing en banc should be in the same form and are subject to the same page and other limitations as a petition for rehearing by a panel, with the following additional requirements:

a. The reference to the en banc request must appear on the cover page and in the title of the petition. 10th Cir. R. 35.2(A).

b. The petition must begin with a statement that either:

(i) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed

(with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(ii) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

Fed. R. App. P. 35(b)(1).

c. An original and **14 copies** must be filed (as compared to an original and three copies for ordinary rehearing petitions). 10th Cir. R. 35.4.

3. *Defective Petitions*. Any petition for hearing or rehearing en banc that fails to comply with Fed. R. App. P. 35(b)(1) and 10th Cir. R. 35.2(A) will not be circulated to the court en banc. If the deficiency is not corrected promptly, the pleading will be stricken. If the noncomplying petition for rehearing en banc is included in an otherwise proper petition for rehearing, the petition will be submitted for disposition only to the original panel unless the petition's deficiency is corrected within 7 days after notification by the clerk of the noncompliance. Untimely suggestions for en banc rehearing will be transmitted to the full court only on express order of the hearing panel. The court may order a case heard or reheard en banc on its own motion.

4. *Matters Not Subject to En Banc Consideration*. Certain procedural and interim matters, such as stay orders, injunctions pending appeal, appointment of counsel, leave to appeal in forma pauperis, leave to appeal a nonfinal order, and leave for an abusive litigant to appeal are not matters subject to en banc consideration. The court will not entertain en banc suggestions with respect to these

matters. 10th Cir. R. 35.7. Requests for reconsideration of panel determinations of such matters will be treated as petitions for rehearing to the judges or panel entering the order from which the request for reconsideration arises.

The court will not entertain a petition for reconsideration of the denial of an en banc suggestion or an en banc disposition. In capital cases, the court will often consider granting a stay of imposition of the sentence en banc. An en banc order denying a stay forecloses a successive en banc petition. Review of an en banc order must be by the Supreme Court.

5. *Processing an Application.* Nondefective petitions for en banc consideration or reconsideration are distributed to each active judge on the court, plus any senior circuit judge, district judge, or visiting judge who sat on the original panel. Only active circuit judges have a vote on the en banc request, although a senior Tenth Circuit judge who was on the original panel decision may elect to sit on the case if an en banc rehearing is granted. En banc hearing or rehearing will occur only if a majority of all of the active circuit judges, except any recused in the case, vote to that effect.

6. *If Rehearing En Banc Granted.* In the exceptional instance when rehearing en banc is granted, the initial panel's **judgment** is vacated, the mandate is stayed, and the case is restored to the docket as a pending appeal, unless the court specifically orders otherwise. However, the entire panel **opinion** is not necessarily vacated. The rehearing may be limited to particular issues, or the en banc court may affirm, without a new opinion, parts of the panel decision already entered. If the court should be equally divided on en banc rehearing, the judgment of the district court (**not** the judgment of the initial panel) will be affirmed.

XI. STAY OR INJUNCTION PENDING APPEAL

The mere filing of a notice of appeal will not stay the judgment appealed. Failure to obtain a stay may not affect the appeal, but absent a stay the prevailing party may treat the judgment appealed as final. But, failure to obtain a stay from an injunctive order, for example, might moot the appeal. A party who wants a district court judgment to be stayed, or who seeks an injunction pending appeal, must generally make the request in the first instance in the district court. In every motion for such relief made to the court of appeals, the movant must show that the district court has denied or failed to afford the relief requested, and state the reasons given, or must show that application to the district court would not be practicable. Fed. R. App. P. 8(a)(2)(A). Application for stay of a decision or order of an agency pending review is made the same way. Fed. R. App. P. 18; 10th Cir. R. 20.1.

A motion may also be made for an emergency stay or injunction pending disposition of a petition to the court of appeals for writ of mandamus or prohibition, or for some other extraordinary writ. In this circumstance it is not necessary to show prior application to the district court.

A. *Jurisdiction*

A motion for stay or injunction is an ancillary proceeding and will not transfer jurisdiction to the court of appeals. In order for the court of appeals to consider such a motion, there must be a pending appeal from a district court judgment, a pending petition for review of a decision or order of an agency, or a pending application for a writ to which the motion for stay or injunction pertains.

B. *Fees*

No separate fee is required to file a motion for stay or injunction, but all required fees must have been paid in the underlying action, or leave to proceed in forma pauperis must have been granted, before the court will act on the motion.

C. *Content of Motion and Supporting Papers*

In addition to showing prior application to the district court or agency, where practicable, and the action of the district court or agency, with reasons given for the action, the movant must show the reason for the relief requested and the facts relied upon. Disputable facts should be supported by affidavits or other sworn statements or copies of them. The motion must be accompanied by copies of the relevant parts of the record. Fed. R. App. P. 8(a)(2)(A)(iii). The court will not consider any application for stay or injunction unless the applicant addresses:

1. the likelihood of success on appeal;
2. the threat of irreparable harm if the stay or injunction is not granted;
3. the absence of harm to opposing parties; and
4. any risk of harm to public interest.

10th Cir. R. 8.1. The motion and supporting papers should be as complete as possible, since the court will not accept ex parte oral statements in support of the motion. The court rarely allows oral argument on motions.

D. *Filing and Service*

An original and three copies of the motion and supporting papers should be filed, together with a certificate of service on all parties to the appeal or proceeding. A motion for stay or injunction must be filed with the clerk of court and will be considered by a panel of judges. Whenever an application for emergency relief is contemplated, the clerk should be given advance notice so that arrangements can be

made for timely submission to the court. In addition, every application that requires the court to act either ex parte or in less than 48 hours in order to effect the relief requested must be plainly marked with the word "Emergency" on its face, must state the effective date of the order, judgment or other action to be stayed, and must be accompanied by a certification of counsel stating why the application was not made earlier. 10th Cir. R. 8.2(A)(1). Although Fed. R. App. P. 8 authorizes such motions to be filed with and considered by a single judge in exceptional cases, the court does not favor submission to a single judge. 10th Cir. R. 8.3(A). Reasonable notice of every application for stay or injunction must be given to all parties, including when, where and to whom the application is to be presented. Fed. R. App. P. 8(a)(2)(C); 10th Cir. R. 8.3(B)(2). In certain circumstances, this may involve more than the usual service required by Fed. R. App. P. 25(b). Every application made to a single judge and every application for ex parte relief, whether to a single judge or not, must be accompanied by a sufficient showing: (1) that the written or oral notice of the application was furnished to opposing counsel, or (2) what, if any, efforts have been made to furnish notice or the reasons why notice should not be required. 10th Cir. R. 8.3.

E. *Responses*

Although the court may grant temporary relief ex parte in appropriate cases, rarely will the court grant a stay or injunction pending appeal without first giving opposing parties time to respond to the motion. All responses received by the clerk before action on the motion will be presented to the court for consideration.

F. *Disposition*

A panel is assigned as soon at it is clear that action is required quickly. Given electronic mail and fax machines, the motion and response and any staff analysis can

be in the hands of the judges in minutes – almost faster than they could be carried to a judge in the Byron White Courthouse. The physical location of the panel members is immaterial to their readiness for prompt dispositive action. Rather, timely notice of urgency and adequate supporting documentation are crucial. The court must know as soon as possible that a request for emergency relief will be filed, and any supporting materials must be complete. If the panel has to wait for a critical document, there will be unnecessary delay in disposition. The court expects the parties to cooperate with respect to notice and coordination of filings; neither tardy applicants for nor dilatory opponents of relief will gain advantage with the court through their delay.

In one case, the introduction of wolves into Yellowstone National Park was stayed. The motion was docketed at 1:21 P.M. and the order was entered at 5:45 P.M. This cannot happen without preparation and planning. The court must know as soon as possible that a request for emergency relief will be filed. The materials must be complete. If the panel has to wait for a crucial document there will be delay. The parties must cooperate, both as to notice and coordinating filing of pleadings. There is no advantage in delay.

XII. RELEASE IN CRIMINAL CASES

The court of appeals may review district court orders respecting release, whether entered before or after a judgment of conviction. Review of a district court order respecting release entered before judgment must be by appeal, 18 U.S.C. § 3145(c), and should be initiated like any other criminal appeal. After reasonable notice to the appellee, the appeal must be heard upon such papers, affidavits, and portions of the record as the parties may present or the court may require. Fed. R. App. P. 9(a).

Review of a district court order respecting release pending a defendant's direct criminal appeal, if initiated by the government, must also be by appeal. 18 U.S.C. § 3145(c) and § 3731. A defendant, however, may seek review of a district court order respecting release pending appeal by initiating a separate appeal, 18 U.S.C. § 3145(c), or by filing in the pending direct criminal appeal a renewed request for release, or for modification of conditions of release. Fed. R. App. P. 9(b). The court prefers the latter approach. All proceedings for review of a district court order respecting release, whether initiated by appeal or by motion, must be expedited and are heard on memorandum briefs and an appendix presented by the party requesting relief. Fed. R. App. P. 9; 10th Cir. R. 9.2.

A. *Tenth Circuit Requirements*

1. *Docketing Statement.* A docketing statement need not be filed in bail appeals.

2. *Preliminary Record.* If review is by appeal, upon the filing of a notice of appeal the district clerk will transmit to the circuit clerk a preliminary record, which in bail appeals must include:

a. a copy of the notice of appeal;

b. a copy of the district court docket entries;

c. a copy of the order or oral ruling respecting release which contains the reasons (findings and conclusion) given by the district court for the action taken; and

d. a statement regarding the fee status of the appeal.

e. *Memorandum or Brief with Appendix*. The court will decide appeals of detention and motions for release or modification of detention orders on memorandum briefs which must contain a statement of the facts and grounds for relief, citation of relevant authorities and a statement as to the defendant's custodial status or reporting date. The court must be kept apprised of any change in custodial status. The party seeking relief must also file two copies of an appendix containing:

f. the order(s) appealed;

g. the motion that was filed in the district court;

h. relevant transcripts;

i. the judgment of conviction, if the motion is postjudgment; and

j. any other parts of the district court record that support appellant's position.

B. *Disposition*

Appeals from district court orders respecting release and motions for release pending appeal will be considered at issue after appellee has had an opportunity to respond, usually 10 days after service of appellant's memorandum brief and appendix. The court may, after reasonable notice to the parties, defer disposition of a bail appeal or of a motion for release until the underlying direct criminal appeal is fully briefed and a full record on appeal is prepared and transmitted. Should the court, after consideration of the memorandum briefs, determine that the appellant has

not met the burden of showing that the judgment and conviction appealed from represents a substantial question of law or fact, the court may consolidate the appeal on the merits with the bail issue and summarily dispose of the entire case on the merits.

XIII. HABEAS CORPUS PROCEEDINGS

A. *Application for Writ*

An application for writ of habeas corpus may be made by a state or federal prisoner. 28 U.S.C. § 2241. The application should be made to the federal district court in whose jurisdiction the applicant is detained. If petitioner was convicted in a federal court, the application must be made to the court of conviction. An application to this court will ordinarily be transferred to the appropriate district court. The district court's action on such application may be appealed, but renewal of the application to this court is not favored. A renewed application may be transferred to the appropriate district court for treatment as a notice of appeal. Fed. R. App. P. 22(a). A second or successive petition may not be filed without permission of the court of appeals. 28 U.S.C. § 2244(b)(3)(A).

B. *Certificate of Appealability*

An appeal by the applicant for the writ may not proceed unless a circuit justice or judge issues a certificate of appealability. When the district judge denies the certificate, the notice of appeal from denial of a writ of habeas corpus constitutes a request to this court for a certificate of appealability. Fed. R. App. P. 22(b)(2). Nevertheless, in order to elicit additional information which can assist the court in determining whether a certificate of appealability should be issued, the court may require appellant to file a separate application on a form provided by the court. Failure to file the required application within the prescribed time may result in dismissal of the appeal. 10th Cir. R. 22.1.

C. *Special Procedures in Death Penalty Cases*

Because of the extraordinary nature of the interests in cases involving the

death penalty and because appeals in cases in which an execution date is set may require an expedited decision or a stay of execution to prevent the appeal from becoming moot, the court has adopted special procedures governing appeals in such cases. 10th Cir. R. 22.2.

1. *Notification of District Court Action.* Counsel for the parties in any death penalty case in which an execution date is set are encouraged to notify the clerk of this court as soon as it appears that an application for relief may be made to a federal district court in this circuit. When a petition is filed in a district court challenging a state court order imposing a death sentence, the petitioner must file with the district clerk a statement certifying the existence of the death sentence and the scheduled execution date, describing the urgent nature of the proceedings, and listing any previous related cases filed in the federal court and any related cases pending in any other court. This statement may be on a form provided by the district court. The district clerk must immediately transmit copies of the petition, with supporting documents and the statement certifying the existence of a death penalty, to the circuit clerk. 10th Cir. R. 22.2(A)(2).

2. *Lodging of Papers Prior to Appeal.* The court of appeals does not acquire jurisdiction until a notice of appeal is filed. Nevertheless, if an application for stay of execution is filed in the district court, the applicant is encouraged to transmit copies thereof, together with supporting documents, to the clerk of this court and to prospective panel judges, whose identity may be obtained from the clerk. The court's facsimile transmission equipment may be utilized in transmitting these papers. All papers so transmitted will be lodged in anticipation of the court's potential jurisdiction. 10th Cir. R. 22.2(B)(2).

3. *Prosecuting the Appeal.* In such cases, the notice of appeal may constitute a request for a certificate of appealability and no separate request or application is required. Fed. R. App. P. 22(b)(2). If the court denies a certificate

of appealability, the court will take no further action and the appeal will be considered ineffective. If the district court or this court grants a certificate of appealability, the court will grant a temporary stay of execution, if necessary, to prevent the appeal from becoming moot. 10th Cir. R. 22.2(C)(3). The court will expressly rule on the merits of the appeal before vacating or denying a stay of execution. 10th Cir. R. 22.2(D).

NOTE - The court has issued a General Order dated April 8, 1999 In re the Procedures for the Management of Death Penalty Matters. *See* Appendix C.

D. *Antiterrorism and Effective Death Penalty Act*

In April 1996, the habeas corpus provisions of the federal civil code were extensively amended. Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996). Under the new legislation, there is a one year statute of limitations on filing a petition for writ of habeas corpus. 28 U.S.C. § 2244(d). There are also new limits on the standards of review that the federal courts may apply to the judgments of state courts. 28 U.S.C. § 2254 and 2255.

Federal as well as state prisoners who file petitions for writs of habeas corpus must obtain a certificate of appealability before an appeal will be considered on the merits. A certificate of appealability may only be granted in limited circumstances. Before a second or successive petition for a writ of habeas corpus may be filed in district court, petitioner must first obtain leave of a three-judge panel of the court of appeals to file the successive petition. The court of appeals must act on the request to file a second or successive petition within 30 days of the date the request was filed. 28 U.S.C. § 2244.

In capital cases, in states which implement certain procedures for providing representation by counsel in state post-conviction proceedings, time constraints are imposed on both petitioner and the courts. The time limits may be enforced by

petition for a writ of mandamus. 28 U.S.C. § 2266.

XIV. MOTIONS

An application for an order or other relief from operation of the rules must be made by filing a motion for such order or relief. Fed. R. App. P. 27(a)(1).

A. *Relief Sought*

Although certain types of relief for which application may be made are referred to in the Federal Rules of Appellate Procedure and the Tenth Circuit Rules (*e.g.*, stay or injunction, release in criminal cases, enlargement of time, stay of mandate, and dismissal, voluntary or otherwise), other kinds of relief may be obtained. Parties may apply by motion for any relief within the authority and discretion of the court. The court is prohibited by the Federal Rules of Appellate Procedure from granting certain relief, and Tenth Circuit Rules restrict applications for other specified types of relief.

1. *Prohibited Relief.* The court has no authority to enlarge the time for filing a notice of appeal, a petition for permission to appeal or a petition to review or enforce an administrative order, except as specifically authorized by law. Fed. R. App. P. 26(b)(1) & (2).

2. *Restricted Relief.* The court will consider motions to affirm or dismiss only on one of the following grounds: the appeal is not within the jurisdiction of the court, there is a supervening change of law, the appeal is moot, or the appeal should be remanded for additional trial court or administrative proceedings. 10th Cir. R. 27.2(A). The court does not favor motions to enlarge the time for filing briefs.

B. *Contents of Motions*

Every motion must state the facts relied upon, the particular grounds on which it is based, and the relief sought. In addition, the motion must contain or be

accompanied by any matter required by specific provisions of the Federal Rules of Appellate Procedure or Tenth Circuit Rules governing such motion. If the motion is supported by affidavits, or other papers, they must be served and filed with the motion. Fed. R. App. P. 27(a)(2)(B)(i). Every motion must state the position of the opposing party. 10th Cir. R. 27.3(C).

C. *Responses*

Any party may file a response in opposition to a motion within 10 days after service of the motion. The court may shorten or extend the time for responding to any motion, and may act upon motions authorized by Fed. R. App. P. 8, 9, 18, and 41, after reasonable notice. The court may act on motions for procedural orders at any time, without waiting for a response. Any party adversely affected by such action may request reconsideration, vacation or modification of the action. Fed. R. App. P. 27(a) and (b). Timely opposition filed after the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; a motion requesting that relief must be filed.

D. *Form and Service*

Motions and other papers must be produced by any process that creates a clear black image on light paper. Motions and related papers must be on opaque, unglazed 8½ x 11 inch paper. A motion or response must contain a caption setting forth the name of the court, the title of the case, the file number, and a brief descriptive title indicating its purpose. Text must be double spaced. Consecutive sheets must be firmly attached at the left margin. An original and three copies must be filed, but the court may require that additional copies be furnished. Filing parties must serve copies of all motions and responses on all other parties to the appeal or review and must file proof of service with the court. Fed. R. App. P. 25(b), (c) & (d). A motion

or response may not be longer than 20 pages. Fed. R. App. P. 27(d)(2).

E. *Disposition*

One or more judges may grant or deny any request for relief but a single judge may not dismiss or otherwise determine an appeal or other proceeding. Fed. R. App. P. 27(c). Fed. R. App. P. 27(c). The action of a single judge or panel of judges may be reviewed by the court, except that orders on procedural and interim matters and leave to appeal from a nonfinal order will not be reviewed by the court en banc. Fed. R. App. P. 27(c); 10th Cir. R. 35.7. The court has provided by local rule that specified types of procedural orders may be disposed of by the clerk, but any party affected by such action may seek review by the court. Fed. R. App. P. 27(b) and 10th Cir. R. 27.3.

XV. RESPONSIBILITIES OF COUNSEL

A. *Admission to Practice*

All counsel, including counsel appointed pursuant to the Criminal Justice Act, who represent litigants in the Tenth Circuit Court of Appeals must be admitted to the bar of the court. An attorney who has been admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals or a United States district court, and who is of good moral and professional character is eligible for admission to the bar of this court. Application for admission must be made on a form approved by the court and furnished by the clerk and must be supported by a written or oral motion of a member of the bar of this court. It is not necessary that the applicant appear before the court for the purpose of being admitted. Application for admission may be made at any time, but an attorney not previously admitted, who files a case or enters an appearance in a case in this court, must be admitted before engaging in further practice before the court. The current fee for admission is $50.00, payable to the clerk as trustee. Fed. R. App. P. 46(a); 10th Cir. R. 46.2(A) & (B). The court will waive the admission fee for any attorney representing the United States or its agency and for any attorney appointed by the court to represent a party to an appeal. A certificate of admission will be issued by the clerk's office.

All attorneys admitted to the bar of the court are subject to disciplinary rules, including the possibility of fines, suspension or disbarment for misconduct or failure to comply with the Federal Rules of Appellate Procedure and the Tenth Circuit Rules. No attorney appearing in a case before the court may withdraw without the court's consent. Once an attorney enters an appearance in the Tenth Circuit he or she has the responsibility to protect any appeal that the client may wish to take to the Supreme Court of the United States.

B. *Appearance by Counsel or Parties*

1. *Entry of Appearance*. Attorneys who authorize their names to appear on papers filed in this court will be deemed to have entered an appearance in the subject case. Within 10 days after an appeal or other proceeding is filed in this court, counsel for the parties must file a written appearance, original and three copies, on a form provided by the court. 10th Cir. R., Form 2. An attorney whose name appears for the first time on subsequently filed papers must likewise file a written appearance. 10th Cir. R. 46.1(A). Parties appearing without counsel must enter their appearance on a pro se entry of appearance form provided by the court. 10th Cir. R. 46.1(B). 10th Cir. R., Form 3.

So that the judges of the court may evaluate possible disqualification or recusal, each written entry of appearance must include a certificate setting forth the names of any and all parties to the litigation not revealed by the caption on appeal, including all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, or other legal entities who or which are financially interested in the outcome of the litigation. The certificate must also list the names of attorneys not entering an appearance in this court who have appeared for any party in a prior trial court or administrative proceeding, or in any related proceedings that preceded the action being pursued in this court. New counsel may adopt by reference a prior filed certificate of interested parties. The adoption must appear on the certificate attached to new counsel's entry of appearance. Counsel are under a continuing obligation to update the certification as necessary to keep the court currently advised. 10th Cir. R. 46.1(C)(6).

2. *Consequences of Appearance*. After entry of appearance, attorneys are responsible for the contents of all papers filed in their names. 10th Cir. R. 46.1(A). The original of every paper filed by counsel for a party must be signed by at least one attorney of record who is an active member in good standing of the bar of this

court. The attorney's address and telephone number must be on the pleading. Parties not represented by counsel must sign the original of every paper filed and include a current address and telephone number. By signing papers filed in the court, attorneys and parties certify that they have read the papers, and that to the best of their knowledge, information and belief, formed after reasonable inquiry, the pleadings are well grounded in fact and are warranted by existing law or good faith argument for the extension, modification, or reversal of existing law, and that they are not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. Papers not signed as required by the rules of court will be stricken. 10th Cir. R. 46.5.

3. *Notice of Rules Violations.* The clerk no longer sends or maintains records of rules violations. Every notice of deficiency is docketed. Attorneys who accumulate too many deficiency notices will be ordered to show cause why they should not be disciplined. 10th Cir. R. 46.6.

4. *Continuance of Representation in Criminal and Post-Conviction Cases.* Retained or appointed trial counsel for a criminal defendant who wishes to appeal a conviction after trial or a conditional guilty plea must continue representation of the defendant unless relieved by the court of appeals. Signing a notice of appeal on behalf of a petitioner or moving party in a post-conviction proceeding under 28 U.S.C. § 2254 or 28 U.S.C. § 2255 is an entry of appearance in this court and an attorney may not withdraw without leave of the court. 10th Cir. R. 46.3(A).

C. *Withdrawal and Dismissal*

1. *Withdrawal of Counsel.* An attorney who has entered an appearance in a case in this court may not withdraw without consent of the court. 10th Cir. R. 46.1(A). A retained or appointed attorney, who seeks to withdraw from a criminal appeal or from an appeal involving post-conviction relief, must state the reasons for

requesting withdrawal in a motion. The motion must include a statement that the client has been advised to obtain other counsel promptly, or, if the client intends to proceed pro se, that the client has been advised of any currently pending obligation under the Federal Rules of Appellate Procedure or the rules of this court. Preliminary prosecution of the appeal (payment of the fee or an appropriate motion, docketing statement, transcript order form and/or designation of record) ordinarily must be completed before the motion will be granted. In addition, the motion must contain one of the following:

a. a showing that new counsel has been retained or appointed; or

b. a showing that appellant has been granted leave to proceed in forma pauperis or has been found eligible for appointment under 18 U.S.C. § 3006A, or that a completed motion for a finding that appellant is eligible for appointment of counsel on appeal has been filed in the district court; or

c. a signed statement from the client demonstrating knowledge of the right to retain new counsel or apply for appointment of counsel and expressly electing to appear pro se; or

d. a showing that exceptional circumstances prevent counsel from meeting any of the requirements stated in subdivisions (a) through (c) above.

Proof of service on the client, as well as all opposing parties, must be furnished. 10th Cir. R. 46.4(A)(4).

2. *Frivolous Appeals*. If counsel in a direct criminal appeal believes the actions is frivolous, a brief must be filed, *see Anders v. California*, 386 U.S. 738 (1967). Counsel must advise the court of the client's address. Appellant will be given an opportunity to personally respond to the brief.

3. *Dismissal of Appeal.*

a. *Voluntary Dismissal.* Civil appeals not involving post-conviction relief

may be voluntarily dismissed by an agreement of the parties or on motion of the appellant, and on such terms as may be agreed upon by the parties or fixed by the court. Fed. R. App. P. 42(b). Similarly, pro se appellants may voluntarily dismiss criminal appeals and appeals involving post-conviction relief. However, any motion to voluntarily dismiss a criminal appeal or an appeal involving post-conviction relief which is filed by counsel must be accompanied by a signed statement from the appellant demonstrating knowledge of the right to appeal and expressly electing to withdraw the appeal; alternatively, counsel must show that exceptional circumstances prevent presentation of a statement. 10th Cir. R. 46.3(B).

b. *Dismissal by the Court*. The court may dismiss an appeal if the appellant, acting pro se or through retained counsel, fails to comply with the Federal Rules of Appellate Procedure or the rules of this court after being notified of such non-compliance and given an opportunity to comply. 10th Cir. R. 42.1. Dismissal of an appeal will not necessarily relieve counsel from possible disciplinary action.

In a criminal case, the appeal will not be dismissed but counsel will be required to show cause why he or she should not be disciplined. 10th Cir. R. 46.6(B) and (C).

D. *Suspension, Disbarment and Discipline*

1. *Effect of Suspension or Disbarment by Another Court*. Any member of the bar of this court who is suspended or disbarred from practice in any other court of record, or who is found guilty of conduct unbecoming a member of the bar of this court, will be ordered to show cause why he or she should not be suspended, disbarred or otherwise disciplined by this court. After a response is filed and after a hearing, if permitted, or on expiration of the time for a response, if no response is

made, the court will enter an appropriate order under the court's Plan for Attorney Disciplinary Enforcement. Fed. R. App. P. 46(b); Plan for Attorney Disciplinary Enforcement, 10th Cir. R., Add. III.

2. *Discipline for Practice in this Court*. The court may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing if permitted, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with the Federal Rules of Appellate Procedure or any rule of the court. Fed. R. App. P. 46(c). Counsel may also be disciplined for failure to comply with 10th Cir. R. 33.1(D) and 33.2(D) which require confidentiality of settlement discussions. *See Pueblo of San Ildefonso v. Ridlon*, 90 F.3d 423 (10th Cir. 1996).

XVI. JUDICIAL MISCONDUCT COMPLAINT PROCEDURE

Section 372(c) of title 28 of the United States Code provides a way for any person to complain about a federal judge who the person believes "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or "is unable to discharge all the duties of office by reason of mental or physical disability." The Tenth Circuit Rules Governing Complaints of Judicial Misconduct and Disability apply only to judges of the Court of Appeals for the Tenth Circuit and to district judges, bankruptcy judges and magistrate judges of federal courts within the circuit. The circuit includes the States of Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming.

The purpose of the complaint procedure is to improve the administration of justice in the federal courts by taking action when judges have engaged in conduct that does not meet the standards expected of federal judicial officers or are physically or mentally unable to perform their duties. The law's purpose is essentially forward-looking and not punitive. The emphasis is on correction of conditions that interfere with the proper administration of justice in the courts.

"Conduct prejudicial to the effective and expeditious administration of the business of the courts" is not a precise term. It includes such things as use of the judge's office to obtain special treatment for friends and relatives, acceptance of bribes, improperly engaging in discussions with lawyers or parties to cases in the absence of representatives of opposing parties, and other abuses of judicial office.

The complaint procedure is not intended to provide a means of obtaining review of a judge's decision or ruling in a case. “Judicial misconduct” *does not include making wrong decisions — even very wrong decisions — in cases.* The law provides that a complaint may be dismissed if it is "directly related to the merits of a decision or procedural ruling."

Complaints are filed with the circuit executive on a form that has been developed for that purpose. Each complaint is referred first to the chief judge of the circuit, who decides whether the complaint raises an issue that should be investigated. (If the complaint is about the chief judge, pursuant to the rules another judge will make this decision).

The chief judge will dismiss a complaint if it does not properly raise a problem that is appropriate for consideration under section 372(c). The chief judge may also conclude the complaint proceeding if the problem has been corrected or if intervening events have made action on the complaint unnecessary. If the complaint is not disposed of in either of these two ways, the chief judge will appoint a special committee to investigate the complaint. The special committee makes its report to the judicial council of the circuit, which decides what action, if any, should be taken. The judicial council is the statutory governing body of the circuit and consists of the chief circuit judge, four judges of the court of appeals and four district judges from the Tenth Circuit. The rules provide, in some circumstances, for review of decisions of the chief judge or the judicial council.

Judicial misconduct complaints are confidential and no filing fee is required. Questions regarding procedures should be addressed (preferably in writing in an envelope clearly marked "Confidential - Complaint of Judicial Misconduct") to the circuit executive at the following address:

Office of the Circuit Executive
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257

A complete copy of the rules and procedures are in Addendum IV to the Tenth Circuit Rules.

APPENDIX A
SAMPLE BRIEF

98-0000

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JUAN DOE, Defendant-Appellant.	

On Appeal from the United States District Court
for the District of Utah

The Honorable Richard Roe
District Judge

D.C. No. 91-CR-000R

APPELLANT'S OPENING BRIEF

Respectfully submitted,
MICHAEL G. KATZ
Federal Public Defender

JENINE JENSEN
Assistant Federal Public Defender
1099 18th Street, Suite 300
Denver, Colorado 80202
(303) 294-7002

STATEMENT REGARDING ORAL ARGUMENT

Counsel does not request oral argument.

TABLE OF CONTENTS

PLEASE NOTE: These Attachments are not available for this Sample Brief.

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

OTHER

PRIOR OR RELATED APPEALS

This is Mr. Doe's second appeal. His first appeal and the government's cross-appeal were decided on January 31, 1994, in *United States v. Doe*, 14 F.3d 0000 (10th Cir.) (remanded for resentencing), *cert. denied*, 511 U.S. 000 (1994).

STATEMENT OF JURISDICTION

The defendant-appellant's conviction under 21 U.S.C. § 841(a)(1) has already been affirmed by the Tenth Circuit. *Doe* I, 14 F.3d at 0000. Mr. Doe was resentenced on August 24, 1994, pursuant to the Tenth Circuit's remand order. (V. I, doc. 76). Mr. Doe timely filed a *pro se* notice of appeal on September 2, 1994. (V. I, doc. 74).

STATEMENT OF THE ISSUES

I. MR. DOE MUST BE RESENTENCED BECAUSE THE DISTRICT COURT DID NOT COMPLY WITH THE PROCEDURAL REQUIREMENTS OF 21 U.S.C. § 851(b).

II. BECAUSE DEFENSE COUNSEL DID NOT REQUEST A ONE-MONTH CONTINUANCE SO THAT THE JUDGE COULD APPLY 18 U.S.C. § 3553(f), AFTER THE JUDGE EXPRESSED HIS DESIRE TO DO SO, MR. DOE WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

STATEMENT OF THE CASE

In October 1992 Mr. Doe was convicted of possession of cocaine, in violation of 21 U.S.C. § 841(a)(1). 14 F.3d at 1480. At that first sentencing, the district judge refused the government's request to enhance Mr. Doe's mandatory minimum sentence from 10 years to 20 years under 21 U.S.C. §§ 841(b)(1)(A) and 851.

Mr. Doe appealed and the government cross-appealed. The Tenth Circuit Court of Appeals affirmed the convictions but reversed the sentence and remanded for resentencing. 14 F.3d at 1486.

At resentencing, the district court imposed a mandatory minimum sentence of 20 years. This appeal followed.

STATEMENT OF THE FACTS

In October 1992 Mr. Doe was convicted of possession of cocaine. 14 F.3d at 1480. At his first sentencing, the district judge refused the government's request to enhance Mr. Doe's mandatory minimum sentence from 10 years to 20 years under 21 U.S.C. §§ 841(b)(1)(A) and 851, holding that the notice filed by the government under § 851 was untimely and inadequate. 14 F.3d at 1484. The judge also noted that under the circumstances of this case the § 851 enhancement "seems to me to be a very very improper kind of thing." (*Doe* I, V. IV, p. 5). The prior conviction relied upon for enhancement was a state conviction for possession of one half gram of cocaine. (*Doe* I, V. IV, p. 5). The judge observed: "It seems almost inconceivable to me that in a state court for one half gram of cocaine, it would be regarded as a felony." (*Doe* I, V. IV, p. 7). It was also noted that Mr. Doe was only a courier. (*Doe* I, V. V, p. 3). The judge refused to increase Mr. Doe's sentence from 10 years to 20 years.

Mr. Doe appealed his conviction, and the government cross-appealed the sentence. The Tenth Circuit Court of Appeals affirmed the convictions but reversed the sentence. On the government's cross-appeal, the Tenth Circuit held that the § 851 notice was both timely and adequate and remanded the case with

directions to the district court to vacate the 10 year sentence and resentence Mr. Doe to a 20 year mandatory minimum sentence. *Doe* I, 14 F.3d at 1486.

At resentencing on August 24, 1994, the judge made every attempt to find a legal avenue for imposing a lesser sentence. (V. III, pp. 2-13). The judge asked if he could take into consideration Mr. Doe's status as a "mule." (V. III, p. 8). The government explained that the only avenue for reducing the sentence below the mandatory minimum was for the government to file a motion for reduction due to the defendant's substantial assistance. (V. III, p. 9). This was not done. (V. III, p. 9). The district court then sentenced Mr. Doe to the mandatory minimum prison term of 20 years. The judge concluded with this:

> The only hope I can suggest if Congress should determine to change the minimum mandatory law and make [the change] retroactive, and some proposals would have it, that could be an ultimate impact and relief.
>
> It's no promise by this court, it's just an observation of something that could happen and might be something to cause this defendant to have some hope in that regard.

(V. III, p. 13).

Exactly one month later, the change in the mandatory minimum law referred to by the judge, 18 U.S.C. § 3553(f), went into effect. As part of the Violent Crime Act of 1994, Congress amended 18 U.S.C. § 3553 by adding new subsection (f), the so-called mandatory minimum "safety valve" provision. It states that in a case under 21 U.S.C. § 841, the court shall impose a sentence in

accordance with the sentencing guidelines, without regard to the statutory minimum sentence, if the defendant meets five criteria.

> (1) The defendant does not have more than 1 criminal history point;
>
> (2) The defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense;
>
> (3) The offense did not result in death or serious bodily injury to anyone;
>
> (4) The defendant was not an organizer, leader, manager or supervisor, and was not engaged in a continuing criminal enterprise; and
>
> (5) By the time of sentencing, the defendant has provided information to the prosecutor concerning the offense. This finding is reserved for the judge to make.

18 U.S.C. § 3553(f)(1-5) is accommodated in the United States Sentencing Guidelines at § 5C1.2 (Nov. 1, 1994) (Limitation of Applicability of Statutory Minimum Penalties in Certain Cases).

This provision was enacted on September 13, 1994, twenty days after Mr. Doe was sentenced. It became effective ten days later, on September 23. This "safety valve" provision in § 3553(f) "reflects a congressional decision that mandatory minimum sentences no longer be applied mechanically." *Shendur v. United States,* 874 F. Supp. 85 (S.D.N.Y. 1995) (emphasis added) (attached as Appendix B).

This appeal followed (*Doe* II).

SUMMARY OF THE ARGUMENT

At sentencing, the district court did not advise Mr. Doe that any challenge to his prior conviction that was not raised at the time could not be raised later. Because this advisement is one of the procedural requirements that must be satisfied in order to impose an enhanced sentence under 21 U.S.C. § 851, Mr. Doe's sentence is illegal. The sentence must be vacated, and the case remanded for resentencing. In addition, trial counsel's failure to request that the resentencing hearing be rescheduled until after the effective date of 18 U.S.C. § 3553(f) deprived Mr. Doe of his Sixth Amendment right to effective assistance of counsel.

ARGUMENT

I. MR. DOE MUST BE RESENTENCED BECAUSE THE DISTRICT COURT DID NOT COMPLY WITH THE PROCEDURAL REQUIREMENTS OF 21 U.S.C. § 851(b).

A. Standard of Review

The procedural requirements of 21 U.S.C. § 851 are jurisdictional in nature, and failure to satisfy a jurisdictional prerequisite cannot be considered harmless error. *United States v. Novey*, 922 F.2d 624, 627 (10th Cir.), *cert. denied*, 501 U.S. 1234 (1991); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 n.3 (1988). The harmless error doctrine does not apply to § 851. *United States v. Wright*, 932 F.2d 868, 882 (10th Cir.), *cert. denied*, 502 U.S. 962

(1991).

B. Discussion

A copy of the transcript of the resentencing hearing is attached as Appendix C.

In 1988, the substantive penalty provisions in 21 U.S.C. § 841 were amended to create enhanced statutory penalties when a defendant has prior convictions. *Novey*, 922 F.2d at 628. The procedure for imposing these enhanced penalties is contained in § 851, which is intended to provide "a measure of protection from their harsh effects." *Id.*

Section 851 is unique in the respect that it sets forth specific procedures allowing a defendant to challenge a prior conviction that the government seeks to use to enhance a sentence for a federal drug offense. United States v. Garcia, 42 F.3d 573, 580 n.8 (10th Cir. 1994) (comparing § 851 with the Armed Career Criminal Act, 18 U.S.C. § 924(e)). At issue here is § 851(b), which provides:

> **Affirmation or denial of previous conviction**
>
> (b) If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(Emphasis added). Subsection (e) further provides:

Statute of limitations

> (e) No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

§ 851(e).

The ritual or procedure set out in § 851(b) is "a functional one, and its omission can result in very real prejudice to a defendant who learns only after he attempts to challenge the prior conviction that that conviction has become unassailable." *United States v. Cevallos*, 538 F.2d 1122, 1128 (5th Cir. 1976). This is true for at least two reasons. First, one purpose of § 851(b) is to ensure that a defendant knowingly and voluntarily waives the right to challenge the prior conviction being used to enhance his sentence before that prior conviction becomes immune from challenge by operation of the enhancement statute. *Cevallos*, 538 F.2d at 1128, adopted in *Novey*, 922 F.2d at 628 n.4. Second,

> unless the Judge complies with § 851(b) in imposing an enhanced sentence, the legal requirements for the lawful imposition of an enhanced sentence have not been met, and thus the enhanced sentence in fact exceeds the normal statutory maximum which the Judge is otherwise authorized to impose. The colloquy required by § 851(b) precedes a quantum jump in the severity of sentence..., making its omission more prejudicial to a defendant [than a mere Rule 32 omission would be].

Cevallos, 538 F.2d at 1128 (emphasis added)(prejudice resulted because defendant did not learn that his prior conviction had become unassailable until

after he attempted to challenge it), cited with approval in *United States v. Olson*, 716 F.2d 850, 853-54 (11th Cir. 1983).

When a sentencing court fails to comply with the statutory requirements by failing to inform the defendant about challenging his prior conviction, or by failing to ask if he had been previously convicted as alleged, the enhanced sentence imposed is illegal and must be vacated. *Cevallos*, 538 F.2d at 1128. "[B]oth tasks are required by § 851(b) prior to imposing an enhanced sentence." *Id.* at 1126. Such a case must be remanded for resentencing in compliance with the statute. *Id.* at 1128. Substantial compliance with § 851(b)'s statutory ritual is not sufficient; there should be strict compliance. *United States v. Garcia*, 526 F.2d 958 (5th Cir. 1976) (dicta).

This Circuit and others require strict compliance with subsection 851(a)(1), which sets forth the procedural requirements for filing the information or notice to support the enhancement. *See Novey*, 922 F.2d 624, and its progeny; *see also United States v. Larsen*, 948 F.2d 1295 (table), 1991 WL 240140 (10th Cir. Nov. 12, 1991) (sentence reversed because government failed to comply with the formal service requirement of subsection (a), even though the defendant had actual knowledge of the filing)(Appendix D). Tenth Circuit decisions have implied, but not expressly stated, that there also must be strict compliance with subsection (b) of the statute. *See Wright*, 932 F.2d at 882 (before the pronouncement of sentence, the district court "must inform the defendant that any

challenge to a prior conviction must be made before sentence is imposed and if it is not, it may not thereafter be raised to attack the sentence"); *Novey*, 922 F.2d at 627 ("the court was without authority to impose an enhanced sentence unless the statutory requirements were met"). *Wright* cites with approval *Olson*, 716 F.2d at 851 (enhanced sentence reversed because there was no compliance with subsections (a)(1), (b), and (c)(1)), and *Cevallos*, 538 F.2d at 1127 ("In sentencing petitioner the district court completely failed to comply with § 851(b), which is a prerequisite to the imposition of an enhanced sentence.").

This Court has not yet addressed a challenge to a sentence due to failure to comply with subsection (b) of § 851. Mr. Doe asserts that in order for his enhanced sentence to be legal, there must have been strict compliance with subsection (b) as well as subsection (a).

In support of this approach, Mr. Doe offers three points. First, subsection (b) provides that the court "shall" make these advisements. "Shall" is not a permissive word; it is mandatory. *United States v. Short*, 947 F.2d 1445, 1460 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1680 (1992); *United States v. Johnson*, 941 F.2d 1102, 1112 (10th Cir. 1991); *United States v. Corral*, 823 F.2d 1389 (10th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988). When the word "shall" appears in a statute, "Congress could not have chosen stronger words to express its intent that [the specified action] be mandatory." *United States v. Monsanto*, 491 U.S. 600, 607 (1989).

Second, this Circuit and others have consistently concluded that strict compliance with subsection (a) (filing of the information) is mandatory, and is jurisdictional in nature. "[S]trict statutory construction is inherent in a standard of strict compliance." *Texas Western Financial Corp. v. Edwards*, 797 F.2d 902, 905 (10th Cir. 1986). Principles of statutory construction require that a statute be construed so that all its provisions have effect, and so that no part of the statute is superfluous. *Homeland Stores, Inc. v. Resolution Trust Corp*., 17 F.3d 1269, 1273 (10th Cir. 1994). "To read out of a statutory provision a clause setting forth a specific condition or trigger to the provision's applicability is. . . an entirely unacceptable method of construing statutes." *Natural Resources Defense Council, Inc. v. United States*, 822 F.2d 104 (D.C. Cir. 1987); 2A Sutherland, *Statutes and Statutory Construction*, §§ 46.05, .06 (C. Sands rev. 4th ed. 1984). Thus, to require less than strict compliance with subsection (b) is inconsistent with these well-recognized principles of statutory construction.

Third, this Circuit had cited and adopted decisions from other Circuits that stand for the proposition that there must be strict compliance with subsection (b). In *Cevallos*, the Fifth Circuit held:

> In *United States v. Garcia*, [526 F.2d 958 (5th Cir. 1976)], decided after oral argument in this case, we held that it was doubtful that substantial rather than strict compliance with § 851(b)'s statutory ritual would suffice. In Garcia the non-compliance with § 851(b) was much less egregious than the complete failure to comply with § 851(b) in the case before us. On the doubtful possibility that substantial compliance with § 851(b) would suffice, there was no such compliance here. In

> sentencing petitioner the District Court completely failed to comply with § 851(b), which is prerequisite to the imposition of an enhanced sentence.

538 F.2d at 1126-27 (footnote omitted).

At Mr. Doe's resentencing, counsel and the judge discussed the general applicability of § 851. (V. III, pp. 2-12). Mr. Doe was permitted to speak, through an interpreter. (V. III, pp. 12-13). Then the court stated: "Well, I have reviewed the case and . . . I cannot see any alternative to the court in this case but to impose the full 20 years, 240 months." (V. III, p. 13). The supervised release term was increased from 5 to 10 years, as required by § 841(b)(1)(A). After the judge's advice on the record about the proposed changes to the mandatory minimum statutes, the hearing was adjourned. There was no mention to the defendant that he was giving up his only opportunity to challenge the validity of his prior conviction; there was no explicit query as to whether he admitted or denied that he had been previously convicted.

This issue did not present itself in Mr. Doe's first appeal, because Mr. Doe was not subjected to the § 851 enhancement.[1] Mr. Doe submits that because the

---

[1] Even if that were not true, when a case is remanded for resentencing after appeal, sentencing begins anew and is to be conducted as "fresh procedure." *United States v. Warner*, 43 F.3d 1335 (10th Cir. 1994); *United States v. Ziegler*, 39 F.3d 1058 (10th Cir. 1994). The Court of Appeals' vacation of a sentence creates a *de novo* resentencing situation in the trial court. *United States v. Smith*, 930 F.2d 1450, 1456 (10th Cir.), *cert. denied*, 502 U.S. 879 (1991).

district court did not comply with subsection (b), his case must be remanded for resentencing.

Although the harmless error rule generally does not apply, other courts have suggested that a district court's failure to advise a defendant about his right to challenge the prior conviction might be considered harmless, but only if such a challenge is already statutorily barred by § 851(e). *United States v. Garcia*, 954 F.2d 273, 278 (5th Cir. 1992); *United States v. Weaver*, 905 F.2d 1466, 1482 (11th Cir. 1990), *cert. denied*, 498 U.S. 1091 (1991); *United States v. Housley*, 907 F.2d 920, 921-22 (9th Cir. 1990). That exception does not apply here. The government's § 851 notice stated that Mr. Doe's prior conviction occurred on June 18, 1988.[2] The § 851 notice was dated October 5, 1992. Because the prior conviction alleged in the information occurred less than five years before the date of the information, Mr. Doe is not precluded from raising a challenge by the statute of limitations in § 851(e).

II. BECAUSE DEFENSE COUNSEL DID NOT REQUEST A ONE-MONTH CONTINUANCE UNTIL AFTER THE EFFECTIVE DATE OF 18 U.S.C. § 3553(f), EVEN THOUGH THE JUDGE EXPRESSED HIS DESIRE TO APPLY THE NEW LAW, MR. DOE WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

---

[2] The date alleged by the government was incorrect; the date of the prior conviction was June 13. *Doe* I, 14 F.3d at 0000 & n.4.

A. Standard of Review

A claim that an attorney's performance was so deficient as to violate a defendant's right to effective assistance of counsel is reviewed de novo. United States v. Rhodes, 913 F.2d 839, 844 (10th Cir. 1990), cert. denied, 498 U.S. 1122 (1991).

B. Discussion

At Mr. Doe's resentencing hearing, the judge made reference to the upcoming change in the mandatory minimum statute. He stated:

> The only hope I can suggest if Congress should determine to change the minimum mandatory law and make them retroactive, and some proposals would have it, that could be an ultimate impact and relief.
>
> It's no promise by this court, it's just an observation of something that could happen and might be something to cause this defendant to have some hope in that regard.

(V. III, p. 13). Defense counsel did not request a continuance, even though the change referred to by the judge -- the "safety valve" provision in the mandatory minimum law -- was to be enacted just three weeks later, to become effective on September 23. This failure to request a continuance is particularly ironic because the Tenth Circuit issued the mandate in this case on February 25, 1994. The mandate was filed in the Utah District Court on March 1, 1994. It then took six months for Mr. Doe to be resentenced; if it had taken seven months rather than

six, then Mr. Doe would be serving a guideline sentence of 121-151 months (10-12 years) instead of a 20 year mandatory minimum.[3]

As a general rule, ineffective assistance claims should not be raised on direct appeal because they usually require consideration of evidence not contained in the record on appeal. *Beaulieu v. United States*, 930 F.2d 805, 806-07 (10th Cir. 1991). Ineffective claims can be raised on direct appeal, however, if the record is sufficiently complete to enable the appellate court to fairly evaluate the ineffectiveness claim. *Id.* at 807. Mr. Doe submits that his ineffective assistance claim can be resolved by reference to the four corners of the record.

Strickland v. Washington, 466 U.S. 668 (1984), governs ineffective assistance of counsel claims. The two-part *Strickland* test is (1) whether counsel's performance fell below an objective standard of reasonableness, and (2) if there is a reasonable probability that, but for counsel's errors, the result would have been different. *Id.* at 687.

(1) An Objective Standard of Reasonableness

Counsel's performance is measured against a standard of reasonably effective assistance. *Id.* An attorney's ignorance of or failure to understand unambiguous law relevant to his client's case falls outside the wide range of

[3] The original Presentence Report (PSR) reflected a total offense level of 32, and criminal history category I. (*Doe* I, V. VIII, pp. 4, 5, ¶¶ 21, 24). Mr. Doe's guideline sentence range, therefore, would be 121-151 months instead of 240 months.

competence demanded of attorneys in criminal cases. *See Hill v. Lockhart*, 474 U.S. 52, 62 (1985) (concurrence); *see, e.g., Strader v. Garrison*, 611 F.2d 61, 63 (4th Cir. 1979) (attorney's ignorance of and misadvice concerning applicable law constitutes ineffective assistance of counsel).

The indisputable rule has long been that when a case is remanded for resentencing, sentencing occurs *de novo*. *United States v. Smith*, 930 F.2d 1450 (10th Cir.), *cert. denied*, 502 U.S. 879 (1991). Changes in the law that become effective between the first sentencing and the second sentencing can be and indeed must be applied at the second sentencing unless doing so would violate the ex post facto clause of Article 1 of the Constitution. *Miller v. Florida*, 482 U.S. 423, 429-35 (1987).

This general principle has already been applied to the "safety valve" statute in very recent cases. *See, e.g., United States v. Ekwunoh*, 1994 WL 702035, No. CR 91-684 (E.D.N.Y. 1994) (attached as Appendix E, pp. 3-4)(district court applied § 3553(f) to case that had been remanded for resentencing to ten year mandatory minimum, because the intervening statute conflicted with the appellate court's mandate, and the statute controlled). *See also Shendur v. United States*, 1995 WL 39493 (S.D.N.Y. Jan. 30, 1995) (Appendix B).

Here, counsel could have discovered the proposed change in the law "had he looked in the published material, but he did not." *Strader*, 611 F.2d at 63. That is especially true where, as here, the sentencing judge brings the change(s)

to counsel's attention. It is reasonable to expect that under these circumstances a criminal defense attorney would be aware of an imminent and important change in the law, and act accordingly. Defense counsel did precisely that in *United States v. Singh*, No. 93-CR-931, 1994 WL 510053 (S.D.N.Y. Sept. 16, 1994) (attached as Appendix F). Singh's sentencing hearing was scheduled for September 16, 1994. His attorney moved to reschedule sentencing until after September 23 because "the amendment to 18 U.S.C. § 3553 created by Title VIII, Section 80001 of the Violent Crime Control and Law Enforcement Act of 1994, just signed by the President, would effectively prevent [the court] from imposing upon him the statutory minimum sentence." (Appendix F, p. 1.) The district court granted the motion, even though it was not entirely sure that the defendant met the five criteria. (Appendix F, p. 3)

Here, it was reasonable to expect that counsel make himself aware of imminent changes in the law controlling mandatory minimum sentences. Even if this were not so, the district court here virtually invited defense counsel to make note of the upcoming amendment and take action -- such as requesting a continuance -- in order to effectively represent his client. Counsel did not do so, and Mr. Doe was severely prejudiced as a result.

(2) <u>But for Counsel's Error, the Result Would Have Been Different</u>.

To establish an ineffective assistance claim, the defendant must also satisfy the second prong of *Strickland* -- but for counsel's ineffectiveness, the result of

the proceeding would have been different. *Strickland*, 466 U.S. at 694. Here, the difference in the result is dramatic. If trial counsel had moved to continue resentencing for 31 days, the judge would have had authority to sentence Mr. Doe under the safety valve provision to a guideline range of 121-151 months.

Of the five criteria set out in § 3553(f) and § 5C1.2, the record unequivocally establish that Mr. Doe satisfies the first four criteria. First, the Presentence Report shows that Mr. Doe has only one criminal history point. Second, he did not use violence or threats, or possess a firearm. Third, no one was injured or killed. Fourth, Mr. Doe did not receive an enhancement for any aggravating role in the offense. § 5C1.1 comment. (n.5). In fact, at both the first and the second sentencing hearings, the judge observed that Mr. Doe was a courier or "mule." (Doe I, V. V, pp. 2-3; V. III, p. 8). As to the fifth requirement, the finding of whether the defendant provided information to the government is "reserved for the judge to make." § 3553(f)(5).

By applying § 3553(f), the judge could have imposed a sentence in the 121-151 month range. Instead, Mr. Doe is serving a mandatory minimum sentence of 240 months (20 years). The prejudice prong of *Strickland* is therefore satisfied.

CONCLUSION

Mr. Doe asks this Court to remand his case for resentencing in compliance with the procedural requirements of § 851. In the alternative, he asks the Court to find that his trial attorney rendered ineffective assistance of counsel by failing to request a continuance.

NOTE - **If oral argument is requested**, following the conclusion a statement of the reason why oral argument is necessary must be included, in addition to the statement on the front cover of the brief. 10th Cir. R. 28.2 (e).

STATEMENT REGARDING ORAL ARGUMENT

Counsel does not request oral argument.

Respectfully submitted,
MICHAEL G. KATZ
Federal Public Defender

(Original Signature Required)

JENINE JENSEN
Assistant Federal Public Defender
1099 18th Street, Plaza Tower, #300
Denver, Colorado 80202
(303) 294-7002

NOTE - The sample brief is less than 30 pages so it does not need a certificate of compliance with the type-volume limitations. A longer brief requires a certificate. *See* Fed. R. App. P., Form 6

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing DEFENDANT/APPELLANT'S OPENING BRIEF was furnished by U.S. Mail or delivered to the following on this the ___ day of _____, _____.

Mr. David Jones
Assistant U.S. Attorney
350 S. Main St.
Salt Lake City, UT 84101

_____
C. Cordova

APPENDIX B
GUIDELINES FOR CJA CLAIMS

United States Court of Appeals - Tenth Circuit

CRIMINAL JUSTICE ACT

CLAIMS FOR HOURLY COMPENSATION AND EXPENSE REIMBURSEMENT

ADVICE TO COUNSEL
TABLE OF CONTENTS

United States Court of Appeals - Tenth Circuit

CRIMINAL JUSTICE ACT

CLAIMS FOR HOURLY COMPENSATION AND EXPENSE REIMBURSEMENT

ADVICE TO COUNSEL

I. General Statutory Provisions

Counsel appointed to provide appellate representation under the Criminal Justice Act may be compensated for time "reasonably expended" and expenses "reasonably incurred." 18 U.S.C. § 3006A(d)(1). For representation completed by November 12, 2000, counsel's total hourly compensation is limited to $2,500; for vouchers including any compensable work billed after that date, the statutory limit has been increased to $3,700 ($3,900 for parole appeals). See § 3006A(d)(2). In either case, however, these presumptive maximums may be exceeded if the representation provided was "extended or complex" and there is a judicial certification that such excess payment is necessary to afford fair compensation. Excess payment must also be approved by the chief circuit judge or her delegate. See § 3006A(d)(3).

II. Excess Compensation Claims

If hourly compensation is sought in excess of the statutory maximum, counsel must submit a concise memorandum showing that the representation was extended or complex and that excess payment is necessary for fair compensation. Counsel may address, as applicable, the complexity/novelty of the issues and shall indicate whether any of these issues were briefed at the district court; matters researched but not briefed; the magnitude and precedential importance of the case; special skills, knowledge, and experience required of or used by counsel; the nature of counsel's practice and any hardship resulting from the representation; and any unusual pressure of time or other factors under which professional services were delivered.

III. When to File

Claims must be submitted on a CJA 20 form within 45 days of final disposition of the case, unless good cause is shown for delay. If counsel is applying for certiorari, then the voucher must be submitted within 45 days after the grant or denial of the petition.

IV. What to File with CJA 20 Form

A. Documents

Copies of the docketing statement, briefs, petitions for rehearing and/or certiorari (if any), and motion for release (if filed in court of appeals).

B. Compensation Worksheets

Attorney time must be documented on the enclosed "In-Court" and "Out-of-Court" worksheets, or on a substantially similar form. Time must be broken down according to date (in chronological order), description of services, amount of time in hours and tenths of an hour, and according to the categories established for payment under the CJA. If billing records are not reported in tenths of an hour, the court will round down the total hours claimed.

Use of the enclosed worksheets facilitates the court's review of counsel's request for compensation, but billing records may be submitted in place of the worksheet so long as they are in chronological order, all hours claimed are assigned to one of the five CJA categories, and the totals for each category are listed on the face of the voucher.

Failure to provide sufficient detail to permit meaningful review of a claim may result in delay or denial of approval of the claim.

Note: records must be retained by counsel for three years after approval of the voucher.

C. Expense Worksheets

Expenses must be documented on the enclosed expense worksheets, or on a substantially similar form. Counsel must provide expense documentation to support claims for reimbursement, such as bills, receipts, or invoices. Credit card slips and credit card statements are *not* sufficient.

V. Claims for Hourly Compensation - General Rules

A. Hourly Rates

In light of recent CJA panel attorney rate increases, counsel is advised to refer to the attached *Criminal Justice Act Payment Rates* (which may differ from the rates stated on the voucher), to ensure proper hourly rates are recorded on the vouchers for the dates worked. Before submitting a voucher to the clerk, counsel may wish to visit the CJA link on the court's website (http://www.ck10.uscourts.gov) to ensure compensation at the correct hourly rates. Submission of a voucher with incorrect rates may result in payment at a lower hourly rate than that to which counsel may be entitled.

B. In-Court Time

In-court time is generally limited to one hour or the actual time of argument. Waiting time may be claimed as out-of-court time.

C. Partners and Associates

Compensation may be claimed for services provided by a partner or associate in appointed counsel's law firm, but extra tasks or other work inefficiencies resulting from such division of labor (e.g., attorney conferencing) is not compensable.

D. Withdrawal of Counsel

An attorney appointed to represent a defendant in the lower court is generally obligated to continue representation on appeal. An attorney who does not desire to continue representation must file a motion to withdraw with the clerk of this court in accordance with 10th Cir. R. 46.4. Failure to comply with this rule will result in denial of the motion. In the event an attorney is allowed to withdraw, the voucher will not be considered for payment until the appeal is terminated, or, if a petition for writ of certiorari is filed, the grant or denial of that petition.

E. Substitution of Counsel

If an attorney is substituted for one previously appointed in the same case, the total compensation to both attorneys shall not exceed the statutory maximum for one party, unless the case involves extended or complex representation. No vouchers

will be considered for payment until the appeal is terminated, or if a petition for writ of certiorari is filed, the grant or denial of that petition.

F. Time Spent on Matters Unrelated to Appeal

Time spent on matters unrelated to appellate representation, even if incidental to arrest or incarceration, is not compensable.

G. Travel Time

Necessary and reasonable travel time is compensable. Time spent in travel by car over long distances ordinarily traversed by air is not reasonable, unless required by special circumstances. If a trip requires overnight lodging, compensable travel time includes time traveling from the claimant's office or home to the place of accommodation, as well as travel time returning directly to the claimant's office or home.

H. Petition for Writ of Certiorari

Counsel's time and expenses involved in the preparation of a petition for a writ of certiorari, or responding to a petition for writ of certiorari filed by the government, are considered as applicable to the case before the United States Court of Appeals, and should be included on the voucher for services performed in that court.

If a petition for writ of certiorari is to be filed, counsel should not submit the CJA voucher until *after* the work related to the petition for writ of certiorari is completed. Submitting one comprehensive voucher that includes work related to any petition for writ of certiorari ensures consistent application of the statutory compensation limits and consistent assessment of the need for judicial certification in cases requesting compensation in excess of the statutory maximum.

I. District Court Work

Claims for work done incidental to representation in district court (even if on remand) may not be included on an appellate voucher.

J. Voucher Preparation

Time spent preparing the voucher is not compensable.

VI. Reimbursement of Travel Expenses - General Rules

A. Reporting Travel Expenses on Voucher

Claims for travel expenses must be itemized and reported in Block 17 of the CJA 20 form.

B. Supporting Documentation for General Travel Expenses

All travel expenses (surface transportation, lodging, meals, mileage, parking, tolls, etc.) must be supported by receipts; credit cards slips and credit card statements are *not* sufficient.

C. Determination of Reasonable Expenses

Reimbursement is limited to reasonable, actual expenditures. To determine whether expenses are reasonable, counsel should be guided by limitations on travel expenses applicable to federal judiciary employees, contained on the attached *Criminal Justice Act Payment Rates*. Rate updates are available from the Clerk's office upon request.

D. Supporting Documentation for Lodging/Meals

Receipts for lodging and meals must be sufficiently detailed to establish that reimbursement is not being sought for alcoholic beverages, safe deposit boxes, hotel safes, in-room movies, or other expenses that are not reimbursable under the CJA. For this reason, hotel and restaurant bills must be submitted; credit card receipts or credit card statements are *not* sufficient.

E. Air Travel

Air travel should be arranged through National Travel Service and government rates obtained for both transportation and lodging. Copies of the travel authorization issued by this court, NTS itinerary, and passenger receipt should be attached to the voucher.

F. Travel by Private Automobile

Automobile mileage is reimbursable at the rate prescribed for federal judiciary employees conducting official business. Claims should be supported by a statement showing the date, distance, origin and destination of travel. If travel is by automobile, the total mileage expense shall not exceed the fare authorized by National Travel Service for tourist-jet accommodation, except in an emergency, or other unusual circumstances.

G. Hotel Telephone

Hotel telephone charges are reimbursable only if incidental to representational duties. Counsel must explain how the charge is incidental to representational duties to receive reimbursement.

H. Personal Items

Personal items (alcoholic beverages, in-room movies, etc.) are not reimbursable.

VII. Reimbursement of Other Expenses - General Rules

A. Reporting Other Expenses on Voucher

Claims for non-travel expenses must be itemized and reported in Block 18 of the CJA 20 form.

B. Supporting Documentation for Other Expenses

Counsel must provide expense documentation to support claims for reimbursement, such as bills, receipts, or invoices; credit card slips and credit card statements are *not* sufficient.

C. In-House Copying

In-house copying is limited to actual costs, and no more than $.10 per page. If a higher rate is sought, counsel must submit a memorandum showing why the rate is justified.

D. Commercial Copying

Claims for commercial copying services must be supported by an itemized invoice; credit cards slips and credit card statements are *not* sufficient.

E. Long-Distance Telephone Calls

Itemized statements must be submitted to support claims for long-distance telephone calls. The supporting documentation must contain the date, cost, recipient of each call, and a short explanation of how each call related to counsel's appellate representation.

F. Facsimile Transmissions

Itemized statements must be submitted to support claims for in-house facsimile transmissions. The supporting documentation must contain the date, total cost (including per page rate), recipient of the document, and a short explanation of how the facsimile transmission related to counsel's appellate representation.

Claims for facsimile transmissions at a commercial establishment must be supported by a detailed receipt. The supporting documentation must contain the date, total cost (including per page rate), recipient of the document, and a short explanation of how the facsimile transmission related to counsel's appellate representation.

G. Postage/Expedited Mail/Courier

Itemized statements must be submitted to support claims for postage. The supporting documentation must contain the postal receipt (if any), date, nature of service, and cost.

Federal Rule of Appellate Procedure 25(a)(2)(B) states that a brief or appendix is timely filed, if on or before the last day for filing, it is:

> (1) Mailed to the clerk by first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or
>
> (2) Dispatched to a third-party commercial carrier for delivery to the clerk within 3 calendar days.

Therefore, the added expense for overnight delivery is not ordinarily reimbursable. The use of expedited mail for filing the petition for rehearing is reimbursable (the

court recognizes the short time period for its filing), if proper supporting documentation is provided.

Professional time spent traveling to the court to file a pleading is not compensable.

H. Legal Research by Law Student, Law Clerk, Paralegal

Claims for the actual cost of legal research by a qualified law student, law clerk, or paralegal must be supported with a brief statement of the need for and subject matter of the research; an estimate of the cost of attorney time that would have been required to do the research; and the actual hourly cost of employing such personnel.

I. Computer Assisted Legal Research

Claims for the actual cost of computer assisted legal research must be supported with a brief statement of the subject matter of the research, the length of time to perform the research, and a copy of the bill for the service or an explanation of the precise basis for the charge.

J. General Office Overhead

General office overhead is not reimbursable–this includes, but is not limited to: supplies; overtime; secretarial services; rent; telephone services; mailers/envelopes; time spent copying, faxing or mailing documents; and other administrative/clerical services (nor is professional time spent on such tasks compensable as part of counsel's fee).

K. Expenses of Personal Nature for Individual Representing

The cost of items of a personal nature purchased for or on behalf of the person represented is not reimbursable.

L. Expenses Unrelated to Appeal

Expenses unrelated to appellate representation, even if incidental to arrest or incarceration, are not reimbursable.

M. Interpreter Services

Prior authorization from the presiding judicial officer must be secured for all interpreter services where the cost will exceed $300. Prior authorization shall be sought by filing a motion including an estimation of the costs and a statement why the expense is reasonable and necessary. Failure to obtain prior authorization will result in the disallowance of any amount claimed in excess of $300, unless the presiding judicial officer finds that, in the interest of justice, timely procurement of necessary services could not await prior authorization.

N. Filing Fees

Filing fees are not reimbursable.

O. Transcript Fees

The cost of court-authorized transcripts should be claimed by the court reporter or reporting service on a CJA 24 form; if counsel has elected to pay for these, counsel should likewise seek reimbursement on a CJA 24 form, not a CJA 20 form.

VIII. General Information

A. Public Disclosure

CJA 20 vouchers filed by counsel may be subject to public disclosure unless disclosure should be limited based upon: (1) protection of any person's Fifth Amendment right against self-incrimination; (2) protection of the defendant's Sixth Amendment right to effective assistance of counsel; (3) the defendant's attorney-client privilege; (4) the work-product privilege of defendant's counsel; (5) the safety of any person; or (6) any other interest that justice may require. If counsel wishes to request redaction or non-disclosure of any portion of the voucher based upon one of these interests, counsel should seek such relief by motion at the time the voucher is filed. Absent such a motion, the face of the voucher will be made available to the public upon request.

B. Panel Attorney Data Form

Counsel is required to provide his/her social security number by completing a Panel Attorney Data Form, which is included with your voucher. If prior to your appointment, you had a pre-existing agreement with a law firm or corporation, including a professional corporation, indicating the CJA

earnings belong to the law firm or corporation, rather than to you as the court-appointed attorney, provide the name and address of that law firm or corporation on the Panel Attorney Form. This information will allow earnings to be reported to the Internal Revenue Service (IRS) on a 1099 Statement as earnings of the law firm or corporation and not as earnings of the attorney appointed.

The Panel Attorney Data Form enables CJA counsel to enter their social security number and their law firms's taxpayer identification number, on the following basis:

(1) If the appointed attorney does not have a preexisting agreement with a law firm or corporation, including a professional corporation, an information return will be filed with the IRS in the attorney's name. The attorney must enter his or her social security number in this situation.

(2) If the appointed attorney has a preexisting agreement with his or her law firm or corporation, including a professional corporation, (resulting in income being reportable by the law firm) an information return will be filed with the IRS in the law firm's name. Thus, the attorney must enter his or her social security number, **and** the law firm's employer tax identification number, as well as the name and mailing address of the law firm.

C. Court's Website

Counsel is encouraged to visit the CJA link on the court's website (http://www.ck10.uscourts.gov) to review current rates, forms, and general information.

IX. Note to Counsel

This letter addresses only subjects of repeated error or frequent inquiry and is not inclusive. Questions regarding the completion of vouchers are welcome. Counsel representing clients under a sentence of death should refer to the court's separate memorandum referencing procedures in capital cases. Counsel in those matters should also review 21 U.S.C. § 848(q).

Source: Volume VII, Guide to Judiciary Policies and Procedures, Chapter II, Part C

CRIMINAL JUSTICE ACT PAYMENT RATES

HOURLY RATES

Professional Services Delivered	12/31/99 and before	1/1/00 and after	4/1/01 and after	5/1/02 and after
In-court	$65	$70	$75	$90
Out-of-court	$45	$50	$55	$90

Counsel practicing in Las Cruces, New Mexico, may claim $75/hour for in-court and out-of-court services, prior to 5/1/02.

Travel Expenses Incurred

Mileage (privately owned vehicle)	**2001** (after 1/22/01)	**2002** (after 1/21/02)	**2003** (after 1/1/03)
	$.34.5/mile	$.36.5/mile	$.36/mile

Subsistence (lodging & meals): Actual cost subject to these local rates:

Location	**1999**	**2000**	**2001**	**2002 as of 10/1/02**
Colorado				
Denver	$122 (up to 5/26/99) $125 (after 5/26/99)	$125 (up to 10/1/00) $128 (after 10/1/00)	$128 (up to 10/1/01) $154 (after 10/1/01)	$158
Kansas				
Kansas City/ Overland Park	$81	$123	$123	$127 (after 10/01/02) $126 (after 11/8/02)
Topeka	$80	$85	$85	$85
Wichita	$96	$96 (up to 10/1/00) $97 (after 10/1/00)	$97 (after 10/1/01)	$101

Subsistence (lodging & meals): Actual cost subject to these local rates:

Location	1999	2000	2001	2002 as of 10/1/02
New Mexico				
Albuquerque	$98	$98 (up to 10/1/00) $103 (after 10/1/00)	$103	$107 (after 10/01/02) $114 (after 12/15/02)
Santa Fe				
Jan. 1–Apr. 30	$124	$136	$145	$145
May 1–Oct. 31	$131		(after 10/1/01)	
Nov. 1–Dec. 31	$124			
Oklahoma				
Oklahoma City	$97	$103	$103	$107
Tulsa	$88	$85	$85	$85
Utah				
Salt Lake City	$118	$117	$211 (1/15-2/28/02) $117 (3/1-12/31/02)	$207 (1/15-2/28/03) $113 (3/1-12/31/03)
Wyoming				
Casper	$80	$85	$85	$85
Cheyenne	$80	$85	$85	$85

APPENDIX C

GENERAL ORDER OF 4/8/99

RE: DEATH PENALTY APPEAL PROCEDURES

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: PROCEDURES FOR THE MANAGEMENT OF DEATH PENALTY MATTERS.

ORDER

Filed April 8, 1999

Before **SEYMOUR**, Chief Judge.

To process and consider capital cases in the most effective and efficient manner, the court adopts the following procedures:

1. Upon receipt of the docketing statement in capital cases arising under 28 U.S.C. §2254 or any federal criminal statute, the Clerk shall enter a case management order directing the parties to schedule a video or phone conference with the chief deputy clerk or other designated court representative. Lead counsel for both parties must be available for the conference.

2. At the designated time, counsel and the court shall address matters related to issues to be appealed, page limitations, record issues, and any other procedural matters which the parties believe are significant in the appeal. At the time of the conference,

counsel shall be prepared to discuss and adopt a briefing schedule. In addition, where appropriate, the court may address issues regarding issuance of a certificate of appealability.

3. The court will issue a scheduling order following the conference. In that order, the court will set all appropriate deadlines. Motions to amend those deadlines are discouraged and the court will deviate from the scheduling order only under very extreme circumstances. These procedures shall be effective as of the date of this order.

Entered for the Court

PATRICK FISHER, Clerk of Court

APPENDIX D

MAPS